93-424

Supreme Court, U.S
FILED
SEP 16 1993
OFFICE OF THE CLERK

No. _____

IN THE

Supreme Court of the United States

October Term, 1993

TRINITY INDUSTRIES, INC.,
Petitioner,

v.

FOREST HENRY SHIPES, *Et Al.*,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

ROBERT E. RADER JR.
RADER CAMPBELL & FISHER PC
2777 Stemmons, Suite 1233
Dallas, Texas 75207
(214) 630-4700

GEORGE A. HARPER
P.O. Box 4
110 W. Ennis Avenue
Ennis, Texas 75120
(214) 875-4744

Counsel for Petitioner

QUESTIONS PRESENTED FOR REVIEW

This is an employment discrimination case under Title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000 *et. seq.*). The questions presented for review are:

1. Whether the United States Court of Appeals for the Fifth Circuit erred in affirming certification of an "across-the-board" class action under *Johnson v. Georgia Highway Express,* 417 F.2d 1122 (5th Cir. 1969), after this Court's decision in *General Telephone Co. v. Falcon,* 457 U.S. 147, 102 S. Ct. 2364, 72 L.Ed.2d 740 (1982)?

2. Whether the Fifth Circuit erred in affirming a back pay award that arbitrarily excludes some members of the class and awards a windfall to others and results in the black class substantially out-earning whites?

PARTIES TO PROCEEDING IN COURT BELOW

The proceeding in the United States Court of Appeals for the Fifth Circuit involved two cases, *Forest Henry Shipes, et al v. Trinity Industries, Inc.,* No. 91-4961 and *Forest Henry Shipes et al v. Robert E. Rader, Jr.,* No. 85-2767. Both appeals were from the United States District Court for the Eastern District of Texas. The two cases were consolidated by the Fifth Circuit. Robert E. Rader, Jr. is not a party to this petition for certiorari. In No. 91-4961 below, the plaintiff and appellee was Forest Henry Shipes. The district court certified the case as an across-the-board class action and designated Shipes as class representative for all black hourly workers at two Trinity plants from 1980-1984. The defendant was Trinity Industries, Inc. which has no parent company and has no subsidiaries other than wholly owned subsidiaries.

TABLE OF CONTENTS

	Page
OPINION BELOW	1
JURISDICTION	2
STATUTES INVOLVED	2
STATEMENT OF THE CASE	3
REASONS THE WRIT SHOULD BE GRANTED	10
CONCLUSION	16
CERTIFICATE OF SERVICE	17
APPENDIX:	
Opinion of the Fifth Circuit Court of Appeals dated April 5, 1993	A-1
Order of the United States District Court for the Eastern District of Texas certifying an across-the-board class action, dated July 30, 1982	B-1
Order of the United States District Court for the Eastern District of Texas on damages, dated December 27, 1991	C-1
Order Denying Rehearing by Fifth Circuit Court of Appeals, dated June 22, 1993	D-1
Judgment and Mandate of the Fifth Circuit Court of Appeals, dated July 2, 1993	E-1

TABLE OF AUTHORITIES

	Page
Albermarle Paper Co. v. Moody, 422 U.S. 405, 95 S. Ct. 2362, 45 L.Ed.2d 280 (1975)	14
Domingo v. New England Fish Co., 727 F.2d 1429, (9th Cir.) *modified on other grounds* 742 F.2d 520 (9th Cir. 1984)	15
General Telephone Co. v. Falcon, 457 U.S. 147, 102 S. Ct. 2364, 72 L.Ed.2d 740 (1981)	4
Giles v. Ireland, 742 F.2d 1366 (11th Cir. 1984)	12
Holsey v. Armour & Co., 743 F.2d 199 (4th Cir. 1984)	11, 12
Ingram v. Madison Square Garden Center, 709 F.2d 807, (2d Cir.) *cert denied* 464 U.S. 937 (1983)	15
Johnson v. Georgia Highway Express, Inc., 417 F.2d 1122 (5th Cir. 1969)	4
Meadows v. Ford Motor Company, 510 F.2d 939 (6th Cir. 1975)	12
Pettway v. American Cast Iron Pipe Co., 494 F.2d 211 (5th Cir. 1974)	7, 13
Pitre v. Western Electric Co., 843 F.2d 1262 (10th Cir. 1988)	15
Shipes v. Trinity Industries, 987 F.2d 311 (5th Cir. 1993)	1
Taylor v. Safeway Stores, Inc., 524 F.2d 263 (10th Cir. 1975)	12
Thompson v. Boyle, 499 F.Supp. 1147 (D.D.C. 1980), *aff'd in relevant part sub nom. Thompson v. Sawyer,* 678 F.2d 257 (D.C. Cir. 1982)	15
United States v. U.S. Steel Corp., 520 F.2d 1043 (5th Cir. 1975) *cert. denied* 429 U.S. 817 (1976)	7, 10
Vuyanich v. Republic National Bank, 723 F.2d 1195 (5th Cir. 1984)	5, 10
Washington v. Brown & Williams Tobacco Corporation, 959 F.2d 1566 (11th Cir. 1992)	11

OPINION BELOW

The Fifth Circuit's opinion (*See* Appendix) is officially reported as *Shipes v. Trinity Industries,* 987 F.2d 311 (5th Cir. 1993). The July 30, 1982, order of the district court certifying the across-the-board class action is not officially reported but is reproduced in the appendix. The district court's December 27, 1991 order on damages is not officially reported but is also reproduced in the appendix.

JURISDICTION

The opinion and judgment of the Fifth Circuit Court of Appeals was rendered on April 5, 1993. Trinity's petition for rehearing was denied on June 22, 1993. The jurisdiction of this Court rests on 28 U.S.C. § 1254.

STATUTES INVOLVED

This lawsuit was filed under Section 703(a) of the Civil Rights Act of 1964, 42 U.S.C. § 2000 e-2(a),(i), which provides

> **(a) Employer Practices.** It shall be an unlawful employment practice for an employer —
>
> > (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin;

This suit was filed as an across-the-board class action under Rule 23(a), Federal Rules of Civil Procedure, challenging Trinity's employment practices in initial placement, initial pay, pay raises, promotions, lay-offs and discharges for cause. Rule 23(a) provides

> **(a) Prerequisites to a Class Action.** One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members if impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

STATEMENT OF THE CASE

Trinity Industries, Inc. manufactures railcars. In the 1960's Trinity opened a plant in West Longview, Texas to manufacture tanks for railroad tank cars. In mid-1979, Trinity opened a plant under different management in East Longview, Texas to manufacture railroad hopper cars. After opening for production, the East Longview plant engaged in rapid, large scale hiring and reached a maximum employment of nearly 450 employees by the end of 1979.

In early 1980 the bottom fell out of the market for railroad hopper cars. Over the next few months, as existing contracts for railcars were completed, Trinity laid off virtually all the employees at the East Longview plant. Ultimately, Trinity was forced to close the East Longview plant and to lay off all but a caretaker crew. Approximately a year later the general recession in the railcar industry forced even the long-established West Longview plant to lay off a number of its employees.

Forest Henry Shipes was hired as a welder's helper at the East Longview plant in October of 1979 during that plant's initial buildup. During the last week of June and the first week of July 1980, Shipes was laid off along with approximately 150 other employees at the East Longview plant.

After he was laid off Shipes filed a charge of discrimination with the Equal Employment Opportunity Commission claiming that he had been denied a pay raise and had been laid off because he was black. The evidence showed that the percentage of blacks employed at the East Longview plant was actually *higher* (23.2%) at the end of the layoffs than at peak employment (23%). When the EEOC expressed doubt that Shipes had been discriminated against because of his race, Shipes requested a right to sue letter rather than wait for the EEOC to make its final determination. Shipes then

filed this across-the-board class action in the Eastern District of Texas, alleging discrimination in initial placement, initial pay, job transfers, pay raises, promotions, layoffs and discharges for cause at the East Longview plant and also at the plant in West Longview.

Trinity vigorously opposed certification of the case as an across-the-board class action. Trinity pointed out that this Court's decision in *General Telephone Co. v. Falcon,* 457 U.S. 147, 102 S. Ct. 2364, 72 L.Ed.2d 740 (1981) restricted the certification of across-the-board class actions previously permitted by *Johnson v. Georgia Highway Express, Inc.,* 417 F.2d 1122 (5th Cir. 1969). Trinity also contended that Shipes was not an adequate class representative for employees at the West Longview plant because employment decisions at the West Longview plant were made independently by different persons than at the East Longview plant, and Shipes had never worked at the West Longview plant and freely admitted he knew nothing about the personnel policies and practices at that plant. Finally, Trinity contended that it was unfair and contrary to established judicial precedent to allow Shipes to bring a suit under Title VII that was far beyond the scope of the complaint filed with the EEOC.

The district court nevertheless certified the case as an across-the-board class action challenging all employment practices at both the East Longview plant and the West Longview plant. In its July 29, 1982 Order, the district court largely disregarded *General Telephone Co. v. Falcon,* stating that the holding in that case was "closely tied to the specific facts of the case" and in "no wise" constituted disapproval of the broad, across-the-board class actions permitted by the Fifth Circuit in *Johnson v. Georgia Highway Express.* Even though the Fifth Circuit subsequently

interpreted *Falcon* to restrict such across-the-board actions in *Vuyanich v. Republic National Bank,* 723 F.2d 1195 (5th Cir. 1984), and even though Trinity again moved to limit the scope of the class, the district court refused to reconsider its July 29, 1982 Order or to limit the class in any way.

The case was bifurcated and the liability portion was tried on a "disparate treatment" theory in late 1984. In a decision entered on October 10, 1985, the district court ruled that plaintiffs had prevailed on the issues of initial pay, promotions, layoffs and terminations for cause at the East Longview plant, and on initial pay and layoffs at the West Longview plant.

Subsequently, the district court, *sua sponte,* appointed an expert to assist the court in establishing damages. Since it was impossible to determine precisely which class members would have been placed in higher paying positions or would have been laid off at a later date, the district court essentially ordered the expert to make a class-wide comparison between how all whites were treated and how all blacks were treated.

To do this, the court's expert first developed a statistical model using only the white employees. For example, to calculate damages in the category of starting pay, the expert developed a regression model using available background data to "predict" starting pay for the white employees. However, since the available background data only explained about 40 percent of the variation in starting rates among whites, the actual starting rates for some whites were higher than the equation predicted and some were lower than the equation predicted. Therefore, for purposes of computing damages for initial pay, the expert "fixed" the starting pay rate for whites at the mean of all the actual

starting rates for whites. Graphically this process can be demonstrated as follows:



Figure 1. Illustration of Distribution of Differences for White Employees Between Rates Predicted from the Model and Actual Rates. Each x represents the difference between the starting pay rate predicted by the statistical model and each white employee's actual starting pay rate.

The expert's second step was to compare the actual starting pay rates of all the black class members with the rate predicted by the model. When the equation was applied to the class it resulted in a similar distribution. The actual starting pay rates for some blacks exceeded the predicted rate while others were less than predicted. However, there were more blacks below the mean. The following graph illustrates the results when the equation for starting pay was applied to blacks.

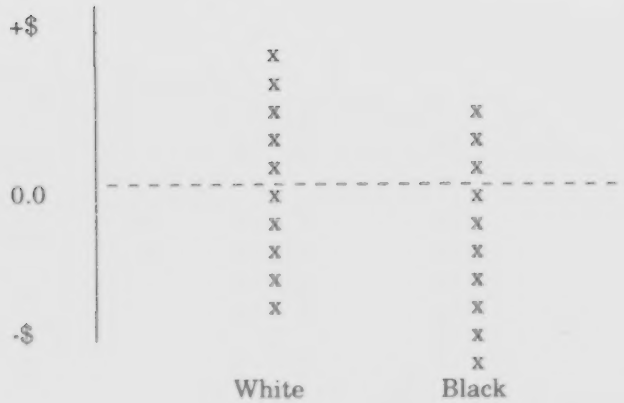


Figure 2. Illustration of Distribution of Differences for White Employees and Black Employees Between Rates Predicted from the Model and Actual Rates

Based on the rationale of such cases as *Pettway v. American Cast Iron Pipe Co.*, 494 F.2d 211 (5th Cir. 1974) and *United States v. U.S. Steel Corp.*, 520 F.2d 1043 (5th Cir. 1975) *cert. denied* 429 U.S. 817 (1976), Trinity contended that the differences between the starting pay rates for whites and blacks should be calculated to arrive at the sum that would shift the entire class of blacks upward so that the distribution of starting pay rates for blacks mirrors the actual starting pay rates for whites. The following figure illustrates the adjustment that would result from this process:

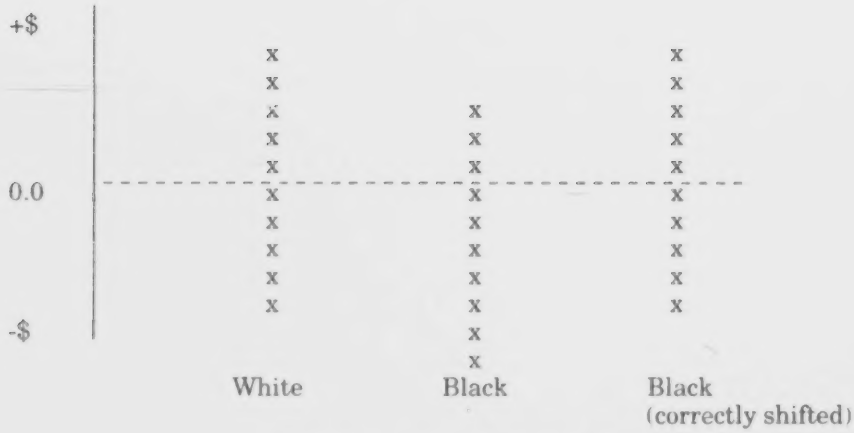


Figure 3. Illustration of Correctly Shifted Distribution of Differences Between Rates Predicted from the Model and Actual Rates for Black Employees

However, rather than calculating damages on a pro rata basis the district court ordered a radically different method that (1) excluded some members of the class from *any* award and (2) granted a windfall to others. The district court ordered that all class members whose starting rates were less than the mean white predicted rate would receive the full amount of the difference. And those class members whose rate exceeded the mean white predicted rate would receive nothing.

Thus, every class member whose "residual" fell below the white mean, was raised to that mean. But the class members whose residual was above the mean were not awarded anything. The district court's method is demonstrated by the following figure:



Figure 4. Distribution of Differences for White Employees and Black Employees Between Rates Predicted from the Model and Actual Rates with the Adjustments Ordered by the Court

The effect of the district court's method of calculating damages can be further demonstrated by the following specific example. Assume that five white employees had starting rates of $9.00, $8.00, $7.00, $6.00 and $5.00. Assume the five black class members had beginning rates of $8.00, $7.00, $6.00, $5.00 and $4.00. Under the method of computation employed in this case, the black class members starting at $8.00 and $7.00 would receive nothing because they were above the mean. However the next three blacks would receive $1.00, $2.00 and $3.00 respectively. After the damage awards were made, if the two groups were compared, the whites would be compensated a total of $35.00 ($9.00 + $8.00 + $7.00 + $6.00 + $5.00) while the class members would be compensated a total of $36.00 ($8.00 + $7.00 + $7.00 + $7.00 + $7.00). Thus, under the district court's "formula" the class as a whole ends up being treated better than the similarly situated whites, but within the class some are overcompensated and some are denied any recovery at all. This same distortion results when the district court's formula is used to calculate damages for starting pay

and promotions at the East Longview plant and for layoffs at both the East Longview and West Longview plants.

On appeal, daunted by the size of the record in the case, the Fifth Circuit panel simply affirmed the district court even though the district court's decision was directly contrary to Fifth Circuit and Supreme Court precedent. The panel held that the district court had not abused its discretion in certifying an across-the-board class action, and that the district court's method of calculating damages was not clearly erroneous. 987 F.2d at 316-317.

Since the panel's decision was directly contrary to the Fifth Circuit's own precedent in cases such as *Vuyanich v. Republic National Bank, Pettway v. American Case Iron Pipe Co.* and *United States v. U.S. Steel Corp.*, Trinity petitioned for rehearing and suggested rehearing *en banc*. Trinity's petition and suggestion was denied on June 22, 1993, and the company now petitions this Court to grant certiorari.

REASONS THE WRIT SHOULD BE GRANTED

The first reason certiorari should be granted is to resolve the conflict between the panel's decision in this case and the decisions of the Supreme Court and other United States Courts of Appeals on the continuing viability of across-the-board class actions in Title VII cases.

In *General Telephone Co. v. Falcon* this Court held that an allegation of discrimination "neither determines whether a class action may be maintained in accordance with Rule 23 nor defines the class that may be certified." 457 U.S. at 157. The Court observed that "the error inherent in the across-the-board rule is the failure to evaluate carefully the legitimacy of the plaintiff's plea that he is a proper class representative under Rule 23(a)." 457 U.S. at 160.

Under Rule 23(a) the class claims must be limited "to those fairly encompassed by the named plaintiff's claims." 457 U.S. at 156.

Other Circuits have interpreted *Falcon* to end the practice of across-the-board class actions. *Eg. Washington v. Brown & Williamson Tobacco Corporation,* 959 F.2d 1566, 1569 (11th Cir. 1992), *Holsey v. Armour & Company,* 743 F.2d 199, 216 (4th Cir. 1984) *cert. denied,* 470 U.S. 1028 (1985). The Fifth Circuit panel in this case, however, affirmed certification of an across-the-board class action. Trinity submits there is therefore a need for the Court to grant certiorari and to explain fully its holding in *General Telephone Co. v. Falcon.* The Court should explain that a plaintiff cannot meet the requirements of Rule 23(a), and that it is inherent error to certify an across-the-board class action in a disparate treatment case, where the employment decisions affecting the plaintiff were made by different supervisors at a different plant than the decisions affecting the other purported class members. Specifically, the Court should hold that the district court erred in certifying a class that included employees at the West Longview plant because the employment and personnel decisions at the West Longview plant were made independently by different supervisors than at the East Longview plant.

The Court has already suggested this is the proper rule in *Bazemore v. Friday,* 478 U.S. 385, 106 S. Ct. 3000, 92 L.Ed.2d 315 (1986). In *Bazemore,* employees of the North Carolina Agricultural Extension Service brought a Title VII action against all the counties in North Carolina alleging discrimination in pay. Plaintiffs sought to certify a defendant class of all the counties in North Carolina. The district court and the Fourth Circuit refused to certify such a broad class. On certiorari this Court agreed that it was improper to certify a class of all counties in North Carolina

because salary decisions were made independently by commissioners in each county. 478 U.S. at 406.

Several of the Courts of Appeals have already applied this principle in Title VII actions and held that the class should be limited to the same management unit that made the personnel decisions that affected the plaintiff class representative. *See e.g. Holsey v. Armour & Co.*, 743 F.2d at 216 (court is "unable to affirm single class treatment for both promotions and hiring claims because the district court made no finding that the supervisors who made the challenged promotions decisions were the same persons who made the hiring decisions . . . . [T]he significant proof for single class treatment required by *Falcon* is lacking in this case."), *Giles v. Ireland,* 742 F.2d 1366, 1371 (11th Cir. 1984) (class limited to blacks in specific work group), *Meadows v. Ford Motor Company,* 510 F.2d 939, 949 (6th Cir. 1975) (affirming limitation of class to plant where plaintiff worked), *Taylor v. Safeway Stores, Inc.*, 524 F.2d 263, 270 (10th Cir. 1975) (class limited to employees at frozen food warehouse where plaintiff worked).

The panel disregarded this principle here. Instead, the panel held that the district court had not abused its discretion in including the West Longview plant in the class because the East Longview plant and the West Longview plant both participated in Trinity's group insurance and retirement programs, used Trinity's corporate forms and used Trinity's corporate employee handbook, and because the supervisors at the two plants -- although admittedly different — used the same "subjective" criteria (*e.g.* performance, versatility, attitude) in making employment and personnel decisions. Trinity submits that this reasoning is unsound on its face. Subjective criteria necessarily play a part in *all* employment decisions. If the use of subjective criteria alone justified certification of an across-the-board

class action then there would be no need for the careful evaluation of the requirements of Rule 23(a) required by this Court in *Falcon*. In addition, certification of an across-the-board class action based on use of subjective criteria is unfair where the allegedly subjective personnel decisions were made by different supervisors. Since, in a disparate *treatment* case, intent is an element of proof, it is unfair to infer that one supervisor at one plant has intentionally discriminated based on subjective decisions made by another supervisor at another plant.

The panel's reasoning that certification of a broad class was justified because the employees at the two plants participated in Trinity group benefit programs is also unsound where the allegations of discrimination do not relate to the group benefit programs themselves. Participation in the same group benefit program has no bearing on whether the employment discrimination claims of the class relating to pay or layoffs are "fairly encompassed by [Shipes'] claims." *Falcon* at 156. Mere participation in a company-wide group insurance program does not, under the circumstances in this case, justify certification of a class beyond the facility where the class representative is employed. The panel's holding flies in the face of *General Telephone Co. v. Falcon*. The Court should therefore grant certiorari in order to clarify and elaborate on the principles announced in *Falcon* as they relate to employers with more than one facility.

The second reason the Court should grant certiorari is to establish the proper method for determining damages for back pay in a Title VII case. Prior to this case the Fifth Circuit had applied the "rightful place" theory whereby class members were awarded back pay sufficient to put them where they would have been but for the discrimination. *See e.g. Pettway v. American Cast Iron Pipe Co.*, 494 F.2d at 252-253. In this case, however, the back pay award upheld

by the panel does not put the class members where they would have been but for the discrimination. As explained above, the award grants some class members a windfall and completely excludes other class members from any award. Moreover, the formula upheld by the panel unfairly punishes Trinity by awarding more back pay than necessary to put the blacks where they would have been but for the discrimination and results in the class substantially outearning the whites.

In *United States v. U.S. Steel Corporation,* the Fifth Circuit had previously held that there is a *presumption* that all class members will share in any back pay award, and a class member may only be excluded from an award upon a showing that he earned more than or at least as much as comparable whites. 520 F.2d at 1054-1055. The Fifth Circuit specifically commended the use of pro rata shares in calculating back pay awards. 520 F.2d at 1055-1056. The Fifth Circuit's decision in *U.S. Steel Corporation* was based on the decision in *Albermarle Paper Co. v. Moody,* 422 U.S. 405, 95 S. Ct. 2362, 45 L.Ed.2d 280 (1975) where this Court implicitly held there was a presumption that all class members will share in any back pay award. *Albermarle Paper Co. v. Moody* held that the *purpose* of Title VII is to make persons whole for injuries suffered through past discrimination and that back pay is necessary to fulfill that purpose. 422 U.S. at 421. Therefore, the court stated, a district court should generally award back pay and if it declines to do so, should "carefully articulate its reasons." *Id.* at n. 14.

In this case, both the district court and the Fifth Circuit panel disregarded *Albermarle Paper Co.* and *U.S. Steel Corporation.* The district court gave no explanation for excluding from any award those class members whose actual starting rates exceeded the predicted rate. The district court totally failed to "carefully articulate" its reasons for

denying back pay to some members of the class, as required by *Albermarle Paper Co. v. Moody.* The district court's decision to exclude class members from the award was upheld by the panel on the assumption that any black treated better than the *average* white could not have been discriminated against. The panel ignored the factual determination that must be satisfied to overcome the presumption for back-pay which arises in favor of each class member. By upholding the district court's decision to exclude class members from the award without the factual determination required by *Albermarle Paper Co.* and *U.S. Steel Corporation* the panel effectively confers almost unlimited discretion on the district court in determining back pay awards.

This Court should therefore grant certiorari, and upon review should clarify that a formula that overcompensates some class members and excludes others should not be used. The Court should further specify that the correct method for calculating back pay in a Title VII case is to include *all* class members in the damage calculation and then to distribute the shares *pro rata.* Indeed, the Fifth Circuit previously suggested this method in *Pettway,* 494 F.2d at 263 n. 154 and numerous other courts have ordered this type of relief in similar cases. *See e.g. Pitre v. Western Electric Co.,* 843 F.2d 1262, 1274, 1279 (10th Cir. 1988) ("distribute [the differences] pro rata"); *Domingo v. New England Fish Co.,* 727 F.2d 1429, 1444 (9th Cir.) *modified on other grounds* 742 F.2d 520 (9th Cir. 1984); *Ingram v. Madison Square Garden Center,* 709 F.2d 807, 812 (2d Cir.) *cert denied* 464 U.S. 937 (1983); ("fairer procedure, we believe, would be to compute a gross award for all injured class members and divide it among them on a pro rata basis"); *Thompson v. Boyle,* 499 F.Supp. 1147, 1170, 1178-79 (D.D.C. 1980, *aff'd in relevant part sub nom. Thompson v. Sawyer,* 678 F.2d 257, 268 (D.C. Cir. 1982).

CONCLUSION

This Court should grant certiorari in order to clarify when a district court may certify an across-the-board class action in a Title VII suit. Guidance from this Court is also needed on how back pay awards should be calculated and when it is appropriate to exclude class members from such an award. The Court has not addressed these issues since *Albermarle Paper Co. v. Moody* and *General Telephone Co. v. Falcon.* Petitioner therefore prays that this Court grant a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

Robert E. Rader, Jr.

Robert E. Rader, Jr.
RADER, CAMPBELL & FISHER
(A Professional Corporation)
2777 Stemmons Freeway
Stemmons Place, Suite 1233
Dallas, Texas 75207
(214) 630-4700

George A. Harper
P.O. Box 4
110 W. Ennis Avenue
Ennis, Texas 75120
(214) 875-4744

ATTORNEYS FOR PETITIONER

CERTIFICATE OF SERVICE

A copy of the foregoing Petition for Writ of Certiorari was mailed to all counsel of record this 15 day of September, 1993.

Robert E Rader Jr

Robert E. Rader, Jr.

Forest Henry SHIPES, on behalf of himself
and others similarly situated,
et al., *Plaintiffs-Appellees,*

v.

TRINITY INDUSTRIES, A Corporation, *Defendant,*
Robert E. Rader, Jr., *Appellant.*

Forest Henry SHIPES, et al.,
Plaintiffs-Appellees,

v.

TRINITY INDUSTRIES, *Defendant-Appellant.**

Nos. 85-2767, 91-4961.

United States Court of Appeals,
Fifth Circuit.

April 5, 1993.

Appeals from the United States District Court for the Eastern District of Texas.

Before WISDOM, JOLLY and DeMOSS, Circuit Judges.

E. GRADY JOLLY, Circuit Judge:

Forest Henry Shipes, a black male, was employed by Trinity Industries. After he was laid off, Shipes filed suit against Trinity under, *inter alia,* Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.* Shipes alleged that Trinity's all-white supervisory force had discriminated against him in decisions concerning his job placement, promotions, and lay-off. The district court certified a class that included all black hourly employees at two of Trinity's plants. The trial was bifurcated, and after the trial on liability Trinity was found to have intentionally discriminated against black hourly employees in initial hiring, promotions, terminations, and lay offs. The district court then appointed an expert who determined damages to individual class members. After an award of attorneys' fees to Shipes in the amount of $308,238.05, judgment was entered. Trinity appeals. Still further, Trinity's trial counsel appeals the district court's imposition of personal sanctions against him pursuant to Fed.R.Civ.P. 37(b) in the amount of $3,000.00.

*On motion of plaintiffs-appellees and by order of this court, Shipes's cross-appeal was severed on March 12, 1993.

I.

Trinity Industries manufactures railcars and structural steel products. Trinity operates over thirty production facilities in thirteen states, including two plants in Longview, Texas. Shipes was employed by Trinity at its plant in East Longview as a welder's helper from October 23, 1979, until he was laid off on June 30, 1980.

On December 16, 1980, Shipes filed suit against Trinity under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.* Shipes alleged that Trinity's all-white supervisory force had discriminated against him personally in decisions concerning his job placement, promotions, and layoff. In addition, the district court permitted Shipes to maintain a class action that included all black hourly workers employed at both of Trinity's plants in Longview, Texas, between January 10, 1980, to April 1, 1984.

The district court bifurcated the trial, and the liability portion was tried in 1984.[1] On October 10, 1985, the district court determined that Trinity intentionally discriminated against plaintiff class members in initial placement and pay and in layoffs at both Longview plants; intentionally discriminated against plaintiff class members in promotions and terminations at the plant in East Longview; and had discriminated against Shipes individually in initial placement and pay, promotions, and layoff. The district court then, *sua sponte*, appointed an expert to determine damages.

On December 6, 1991, the expert submitted a model for damages, and on January 22, 1992, the district court entered partial final judgment and ordered that each class member have and recover from Trinity the amount determined by the court-appointed expert. Trinity had urged the district court to order class-wide relief, but instead the district court instructed the expert to determine damages on an individual-by-individual basis. The district court

---

[1]During the course of discovery, the district court imposed personal sanctions against Trinity's trial counsel, Robert Rader, Jr. Rader's appeal of these sanctions has been consolidated with this appeal.

subsequently awarded Shipes $308,238.05 in attorneys' fees. Trinity appeals, and Trinity's trial counsel appeals the imposition of personal sanctions.

II.

On appeal, Trinity challenges class certification, the computation of the back pay award, and the determination of attorneys' fees.[2] Trinity first appeals the district court's certification of a class, arguing that Shipes should not have been allowed to represent blacks employed at a different plant from the plant at which he worked. Second, Trinity appeals the district court's method of calculating the back pay remedy. Trinity argues that the district court erred in determining back pay awards on an individual-by-individual basis. Trinity contends that the district court should have ordered class-wide monetary relief—that is, it should have awarded each and every plaintiff class member his *pro rata* share of a pre-determined total monetary award. Third, Trinity appeals the district court's determination of attorneys' fees, arguing that the district court double counted factors and relied on erroneous considerations in enhancing the award.

On the other hand, Shipes first argues that the district court did not err in class certification. Shipes also argues that the district court did not err in formulating the back pay remedy. Furthermore, Shipes argues that the district court correctly calculated the lodestar amount of attorneys' fees and properly enhanced this amount.

---

[2]Trinity also argues on appeal that the district court erred by not including voluntary resignations in its analysis of discrimination in layoffs. Trinity itself originally excluded from its layoff analysis those employees who had resigned. Its analysis, however, showed that a statistically significant higher number of black employees than whites had been laid off. Thus, Trinity then revised its study and included those employees who had resigned. Trinity, however, presented no evidence of actual employee motivation in resigning. Furthermore, Shipes's analysis still showed an unfavorable result to black employees even when employees who had resigned were included in the statistical data. The district court found Trinity's proposal to include employees who had resigned in its analysis of discrimination in layoffs unsupported and illogical; we find no reversible error in the district court's decision.

In a consolidated action, Trinity's trial counsel, Robert Rader, Jr., contends that the district court abused its discretion by imposing personal sanctions against him in the amount of $3,000.00. Shipes argues that the sanctions were warranted because of Rader's failure to comply with discovery requests.

III

[1-3] We first address Trinity's argument that the district court should not have certified a class that included employees not only at the plant where Shipes was employed, but also employees at an additional plant. The district court's certification of a class is reviewed under the abuse of discretion standard. *Merrill v. Southern Methodist Univ.*, 806 F.2d 600, 607 (5th Cir.1986). Furthermore, the district court has wide discretion in deciding whether to certify a proposed class. *Jenkins v. Raymark Indus., Inc.*, 782 F.2d 468, 471-72 (5th Cir.1986).

[4, 5] Trinity argues that Shipes failed to satisfy the commonality and typicality requirements of Fed.R.Civ.P. 23(a), and thus it was an abuse of discretion for the district court to certify a class.[3] The district court determined that the two plants Trinity operated in Longview utilized the same subjective criteria in making personnel decisions; white supervisors at both plants applied the subjective criteria; employees were transferred between the two plants; the two plants had the same insurance plan, retirement programs, and administrative forms; and the two plants used the same Hourly Employee Handbook. The threshold requirements of commonality and typicality are not high; Rule 23(a) requires only that resolution of the common questions affect all or a substantial number of the class members. *Jenkins*, 782 F.2d at 472. Allegations of similar discriminatory employment practices, such as the use of entirely subjective

[3]Rule 23(a) provides that one or more members of a class may sue on behalf of all if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

personnel processes that operate to discriminate, satisfy the commonality and typicality requirements of Rule 23(a). *Carpenter v. Stephens F. Austin State Univ.*, 706 F.2d 608, 617 (5th Cir.1983). The district court clearly did not abuse its discretion in certifying the class.

IV

A

[6, 7] We next turn to Trinity's argument relating to damages. The district court's calculation of a back pay award is reviewed under the clearly erroneous standard. *Pegues v. Mississippi State Employment Serv.*, 899 F.2d 1449, 1455 (5th Cir.1990). At the outset, we observe that fashioning a class-wide back pay award is exceedingly complex and difficult, and the process is fraught with uncertainty. *Pettway v. American Cast Iron Pipe Co.*, 494 F.2d 211, 260 (5th Cir.1974). Two general premises apply to the computation of a back pay award: (1) unrealistic exactitude is not required, and (2) uncertainties in determining what an employee would have earned but for the discrimination should be resolved against the discriminating employer. *Claiborne v. Illinois Cent. R.R.*, 583 F.2d 143, 149 (5th Cir.1978), *cert. denied*, 442 U.S. 934, 99 S.Ct. 2869, 61 L.Ed.2d 803 (1979). Furthermore, the district court must be granted wide discretion in resolving ambiguities. *United States v. United States Steel Corp.*, 520 F.2d 1043, 1050 (5th Cir.1975), *cert. denied*, 429 U.S. 817, 97 S.Ct. 61, 50 L.Ed.2d 77 (1976).

B

The district court ordered that back pay be determined on an individualized basis. The district court ordered that only each class member, whose beginning pay rate at the time he started working for Trinity was below the average beginning rate for white employees with the same qualifications, should receive a back pay award; the award raised the hourly rate of such individual class member by the difference between his beginning rate and the average white beginning rate. Trinity argues that this back pay remedy violates the fundamental rules of calculating such an award

because it unfairly excludes some class members and grants a windfall to other class members. Trinity argues that the district court should have determined a total sum that represented the difference between black and white beginning rates as a whole, and then divided this amount to all class members on a *pro rata* basis.[4] Trinity argues that such an increase to class members would tend to eliminate the racial characteristics reflected in the distribution of pay rates; in other words, black and white employees in representative numbers would occupy the highest pay rates as well as the middle and lower pay rates.

Trinity also argues—somewhat vaguely—that the district court's formula for determining back pay for premature separation from employment was equally flawed. For premature separation from employment, the district court ordered a comparison between the actual length of service of each class member and the median length of service of white employees hired in the same time period. Each plaintiff class member whose service was less than the median length of service for white employees received an award equal to the difference.[5] Again, Trinity argues that the appropriate remedy is to calculate the total difference in the treatment of the classes and then award each class member his *pro rata* share.

---

[4]Under Trinity's proposed method, every class member would receive the same monetary award. In the calculation of the back pay award for initial rate, for example, the average starting rate for white employees as a group would be compared to that of plaintiff class members. Simply illustrated, if five white employees had beginning rates as a group of $5.00, $6.00, $7.00, $8.00, and $9.00, the average would be $7.00. If five class members had beginning rates of $3.00, $4.00, $5.00, $6.00, and $7.00, the average would be $5.00. The total difference in rates between the groups would be $2.00, (the difference in averages) multiplied by 5, the number of class members, or $10.00. This amount, $10.00, would then be distributed *pro rata* to the class members, each class member receiving a back pay award of $2.00, or $10.00 divided by 5. Trinity's method would thus shift the entire group of plaintiff class members upward by that amount.

[5]For example, if the average length of employment for white employees hired during a particular time period was two years, but a black employee hired during this same time period was laid off or terminated after one year, the black employee would be entitled to back pay for one year.

C

On the other hand, Shipes defends the district court's remedy. Shipes argues that the district court's remedy was adopted in order to bring the pay level of each black employee who was paid less than the average salary of white employees with equal qualifications up to the level of that average. Shipes argues that the method proposed by Trinity is not intended to, and does not, compensate *individual* black employees to the extent to which they were underpaid relative to white employees with their qualifications; instead, Trinity's method is concerned only with equalizing the amounts paid to whites and blacks as a group.

Shipes argues that under Trinity's plan, each class member would receive the same increment to his initial pay, regardless of the amount by which he was actually underpaid or regardless of whether he was underpaid at all. Shipes points out that some blacks were hired at rates equal to comparable whites. Thus, there is no basis to find that these black employees were discriminated against. Consequently, Shipes argues that Trinity's proposed *pro rata* award to all black employees would in effect deduct from the wage rate awarded each black employee who was underpaid and, in effect, grant that money as a windfall to non-discriminatees.

D

[8, 9] Let us begin our evaluation of these arguments by observing that a Title VII class action suit imposes on the plaintiff a bifurcated burden of proof. First, the plaintiff must establish invidious class-based treatment; next, he must prove damages caused to class members by that illegal conduct. A finding of racial discrimination against a class "does not necessarily mean that every member of the class is entitled to back pay." *Johnson v. Goodyear Tire & Rubber Co.*, 491 F.2d 1364, 1375 (5th Cir.1974). Once a *prima facie* case of discrimination against a class is made, a presumption of back pay arises in favor of all class members; this presumption does not, however, *per se* entitle a class member to back pay without some individual clarification. *Pettway*, 494 F.2d at 259. Once it has been determined that

the class has been subjected to unlawful racial discriminatory practices, only those individuals who have suffered a loss of pay because of the illegal discrimination are entitled to compensation. *Johnson,* 491 F.2d at 1376. Title VII does not require a remedy for those not discriminated against. *Gamble v. Birmingham So. R.R. Co.,* 514 F.2d 678, 686 (5th Cir.1975).

[10, 11] The complexity of the case is a determining factor in what method the district court should utilize to formulate a back pay award. *Pettway,* 494 F.2d at 261. If the class is small, the time period short, or if the effect of the discrimination is straightforward, an individual-by-individual determination of what each claimant's position would have been but for the discrimination is possible. *Id.* If, however, the class is large, the promotion or hiring practices are ambiguous, or the illegal practices continued over an extended period of time, a class-wide approach to the measure of back pay may be necessitated. *Id.* The process of computation is not, however, an "either, or" approach, and the determination of a back pay model is not a choice between one approach more precise than another. *Id.* at 261 n. 151.

[12] Methods for determining back pay possessed of superior certainty, such as the approach adopted by the district court, should be exhausted before resorting to racially drawn class-wide comparisons or *pro rata* approaches. *United States v. Steel Corp.,* 520 F.2d at 1055. The fact that a class is large does not mean that *pro rata* relief should automatically be ordered. As noted earlier, not all members of a class are automatically entitled to back pay and there should be, if possible, a determination on an individual basis as to which class members are entitled to damages and the amount of such recovery. *Johnson,* 491 F.2d at 1375.

E

[13] To reverse the district court, we would have to conclude that its calculations of back pay were clearly erroneous. On December 27, 1990, the district court entered an order that established the guidelines that the

court-appointed expert was to follow in constructing the final model for back pay damages. With respect to discrimination occurring in wage rates upon initial hiring, the district court ordered that back pay be awarded to particular class members based on the difference between the average starting wage paid to white employees with the class member's qualifications and the actual starting wage paid to such class member.

On July 29, 1991, the district court entered a second order relating to damage calculations. In this order, the district court addressed Trinity's concern that calculations for the class should be determined as a total sum, and then damages awarded to each class member on a *pro rata* basis. The district court stated that Trinity's proposal rested on the assumption that a class-wide finding of discrimination implies that each class member was affected equally by the discrimination and therefore damages should be determined by comparing the class of white employees with the class of black employees. The district court, however, expressly rejected this argument, stating that Trinity's proposed method of awarding damages was inappropriate. Specifically, the district court stated that although Trinity was found liable for discrimination against the plaintiff class generally, it could not be assumed that such discrimination was uniformly felt by all class members.

The back pay model adopted by the district court has two sections. First, for back pay remedying discrimination in initial starting salary, each individual class member was compared to white employees who had the same educational background and work experience. If a class member was paid a starting rate below the average starting rate of white employees with the same qualifications, the class member was awarded that difference as back pay. Second, for back pay in premature separation from employment, each individual class member was compared to white employees who were hired in the same time period. An average length of employment for these white employees was determined. If a class member was laid off or terminated before the average length of employment for the group of

comparable white employees, he was awarded the difference as back pay.

[14] Under the back pay formula relating to initial pay rates, those individual class members who were paid starting rates above the average starting rates of white employees with the same qualifications received no back pay award. Similarly, those individual class members who were not laid off or terminated prior to the average length of employment for white employees hired in the same time period received no back pay award. A Title VII plaintiff, however, is not entitled to recover an amount greater than his pecuniary loss. *Pegues,* 899 F.2d at 1457. Because these class members did not suffer pecuniary losses as a result of Trinity's discrimination, it follows that they are not entitled to an award of back pay. After carefully reviewing the record and the back pay remedy ordered by the district court, it is our opinion that the remedy ordered was not clearly erroneous. The district court's back pay remedy is therefore affirmed.

V

A

[15, 16] We now address Trinity's argument concerning the attorneys' fees awarded to Shipes. The district court's determination of attorney's fees is reviewed for abuse of discretion, and the findings of fact supporting the award are reviewed for clear error. *Von Clark v. Butler,* 916 F.2d 255, 258 (5th Cir.1990). As the first step in determining the amount of attorneys' fees to award, the district court must determine the compensable hours from the attorneys' time records, including only hours reasonably spent. *Alberti v. Klevenhagen,* 896 F.2d 927, 930 (5th Cir.), *vacated in part,* 908 F.2d 352 (5th Cir.1990). As a second step, the district court must select an appropriate hourly rate based on prevailing community standards for attorneys of similar experience in similar cases. *Id.* The number of compensable hours is then multiplied by the selected hourly rate to produce the "lodestar" amount.

[17] Shipes sought recovery of attorneys' fees for 1,306.88 hours of time at a rate of $175.00 per hour for lead counsel

and $150.00 per hour for associate counsel. The district court, after determining beyond doubt that the plaintiffs had indeed prevailed on the central issue of the lawsuit and were thus prevailing parties, ordered payment of 100% of the time requested at a rate of $165.00 per hour for lead counsel and $140.00 per hour for associate counsel, for a total fee award of $144,712.70. The district court stated that only four of the *Johnson v. Georgia Highway Express,* 488 F.2d 714 (5th Cir.1974), factors were subsumed in the lodestar amount: (1) time and labor required; (2) customary fee; (3) counsel's experience and ability; and (4) awards in similar cases.[6] After determining that the hours accurately reflected the time expended in this action, the district court further determined that the rates proffered by Trinity were too low, but that Shipes's attorney had failed to show that attorneys with abilities comparable with her actually received $175.00 per hour. For this reason, the district court ordered payment at the hourly rate of $165.00, which represented the amount recently applied by the district court for work performed by lead counsel in employment discrimination cases.

The district court did not err in its calculation of the lodestar amount. The district court reviewed the attorneys' time records and found them to be more than adequate. The district court did not simply accept the hourly rate suggested by Shipes's attorneys, but instead lowered it to an hourly rate that had been applied in the community for similar cases. The district court further ordered that the hourly rates for the attorneys be reduced for the time the attorneys spent traveling. We find that the district court did not err in its determination of the lodestar amount of $144,712.70.

---

[6]The twelve *Johnson* factors are (1) the time and labor involved; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal services properly; (4) the preclusion of other employment by the attorney due to this case; (5) the customary fee; (6) whether fee is fixed or contingent; (7) time limitations; (8) the amount involved and results obtained; (9) the experience, reputation, and ability of counsel; (10) the undesirability of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases. *Johnson v. Georgia Highway Express,* 488 F.2d 714, 717-19 (5th Cir.1974).

B

[18, 19] After determining the lodestar amount, the district court may adjust the lodestar up or down in accordance for relevant *Johnson* factors not already included in the lodestar. After calculating the lodestar amount, the district court must then apply the remaining *Johnson* factors to determine if the lodestar should be adjusted; the district court must be careful, however, not to double count a *Johnson* factor already considered in calculating the lodestar when it determines the necessary adjustments. *Von Clark*, 916 F.2d at 258. Furthermore, the district court must explain with a reasonable degree of specificity the findings and reasons upon which the award is based, including an indication of how each of the *Johnson* factors was applied. *Id.* Four of the *Johnson* factors—the novelty and complexity of the issues, the special skill and experience of counsel, the quality of representation, and the results obtained from the litigation—are presumably fully reflected in the lodestar amount. *Alberti*, 896 F.2d at 930. Although upward adjustments of the lodestar figure based on these factors are still permissible, such modifications are proper only in certain rare and exceptional cases supported by both specific evidence on the record and detailed findings by the lower courts. *Id.*

After calculating the lodestar amount, the district court enhanced the fee on five additional *Johnson* factors. First, the district court determined that the lodestar amount should be enhanced for the novelty and difficulty of the case, stating that this action involved representation of over three hundred employees at two manufacturing plants, challenged the entire spectrum of Trinity's employment decisions, and involved complex, highly technical data. Second, the district court enhanced the lodestar amount based on the skill required, stating that Shipes's claim necessitated extensive analysis, which Shipes's counsel competently presented. Third, the district court enhanced the lodestar amount for the preclusion of other employment, stating that Shipes's counsel's total time commitment to this case for several months adequately demonstrated that this case was inordinately time-consuming and precluded

the acceptance of other requests for representation. Fourth, the district court enhanced the lodestar amount based on special time limits imposed, stating that Shipes's counsel's claim of nearly total time commitment before trial supported an upward fee adjustment because of the exceptional skill needed to present the last-minute data in an intelligible manner. Fifth, the district court enhanced the lodestar amount based on the amount of money involved and the obtained, stating that the outcome of this lawsuit represented a tremendous victory based upon the large number of claimants and the probable enormity of the relief.[7] On December 7, 1987, the district court ordered an 80% enhancement of the lodestar award based on these five *Johnson* factors, increasing the attorneys' fee award from $144,112.70 to $260,482.86. 685 F.Supp. 607.

C

[20] We find that four of these five *Johnson* factors used by the district court to enhance the lodestar amount—the novelty and difficulty of the case, the skill required, special time limits imposed, and preclusion of other employment—are supported, and thus enhancement based on these factors was unwarranted. We do think, however, that enhancement due to the results obtained may be warranted.

[21] The district court enhanced the lodestar amount based on the novelty and difficulty of the case because it found that there were over three hundred plaintiffs, an entire spectrum of employment decisions was being challenged, the case was complex and highly technical, and Trinity's obstinate conduct caused additional difficulty. These factors—not uncommon in much present-day litigation—simply do not render a case "rare" or "exceptional" for purposes of enhancing the lodestar amount. All counsel competent to handle a case such as this one are expected to be able to deal with complex and technical matters; this expertise is reflected in their regular hourly rate, based on

[7]The district court further determined that enhancement should not be granted for two remaining *Johnson* factors: the undesirability of the case and the nature and length of professional relationship with the client.

fees for counsel of similar experience and ability. Still further, the difficulty in the handling of the case is adequately reflected in the number of hours billed—hours for which the attorney is compensated in the lodestar amount. Similarly, obstinate conduct by opposite counsel is compensated by the additional number of hours that are required to prevail over such obstinacy.

[22] The district court's enhancement based on two other factors—the skill required and special time limits imposed—was, we think, also unwarranted as each is accounted for in the lodestar amount. Even though Shipes's counsel presented extensive statistical data with competence, nothing less should be expected of counsel; consequently, this factor alone does not support enhancement. We also find as an unwarranted basis for enhancement "special time limits imposed" by the defendant's necessitating that Shipes's attorney evaluate last-minute data shortly before trial. Again, we emphasize that this factor is not an abnormal occurrence—especially in a trial involving statistics and complex data—and is accounted for by the additionally required hours that are reflected in the lodestar.

[23] We also conclude that the district court improperly enhanced the lodestar based on the preclusion of other employment. The district court found that Shipes's counsel was totally committed to this case for several months prior to trial and concluded that this demonstrated that counsel was precluded from accepting other requests for representation. The district court did not make a finding that Shipes's attorney had indeed been required to refuse other employment because of this case, and enhancement based on this factor is therefore unsupported. Furthermore, this factor will ordinarily be subsumed within the lodestar amount: If, for example, Shipes's attorney worked on nothing but this case, then this potential loss of income in refusing other employment is compensated for in the number of hours she billed in the instant case.[8]

---

[8]We also note that the complaint in this case was filed on December 16, 1980, the trial began on November 19, 1984, and partial final judgment on liability was entered on October 10, 1985; for this extended period of

We do think, however, that the district court may have been warranted in enhancing the lodestar amount because of the amount involved and results obtained.[9] Shipes's victory was complete on all issues. Furthermore, the victory resulted in a substantial award of monetary damages for class members—plus, and very importantly, future protection against discrimination in the form of injunctive relief. For these reasons, enhancement of the lodestar amount on account of the results obtained may have been warranted. On remand, the district court must determine whether it is customary in the area for attorneys to charge an additional fee above their hourly rates for an exceptional result after lengthy and protracted litigation. If Shipes's attorneys can demonstrate this area custom, the district court will be warranted in enhancing the lodestar in an appropriate amount based on this factor.

D

[24] On August 4, 1988, the district court ordered an additional 33% enhancement of the lodestar amount based on the risk of not prevailing, or the contingent nature of the case. The district court found that the clear improbability of plaintiffs' ability to find counsel to represent them in similar actions within the district warranted the contingency enhancement.

In *Islamic Center of Mississippi v. Starkville,* 876 F.2d 465 (5th Cir.1989), this court adopted the approach to enhancement for the contingent nature of the case set forth in Justice O'Connor's concurrence in *Pennsylvania v. Delaware Valley Citizens' Council (Delaware Valley II),* 483 U.S. 711, 107 S.Ct. 3078, 97 L.Ed.2d 585 (1987). In *City of*

---

time, however, Shipes's attorneys sought fees for only 1,306.88 hours. Certainly during this time period Shipes's attorneys were not precluded from accepting other employment because of this case.

[9]As we stated earlier, this factor is presumably reflected in the lodestar amount and enhancement based on results obtained is proper only in rare and exceptional cases supported by specific evidence and detailed findings by the district court. *See Alberti,* 896 F.2d at 930. On remand the district court should take cognizance of this requirement in deciding whether to enhance the lodestar amount based upon the results obtained.

Burlington v. Dague, ___ U.S. ___, 112 S.Ct. 2638, 120 L.Ed.2d 449 (1992), however, the Supreme Court rejected Justice O'Connor's approach. In *Burlington*, the Court first noted that, "[a]lthough different fee-shifting statutes are involved, the question is essentially identical" to the question it had addressed, but which it had not resolved in *Delaware Valley II:* whether a court may enhance the fee award above the lodestar amount in order to reflect the fact that the party's attorneys were retained on a contingent-fee basis and thus assumed the risk of receiving no payment at all. In *Burlington*, the Court was urged to adopt the approach set forth by Justice O'Connor in *Delaware Valley II*. The Court expressly declined to do so, however, stating that "we do not see how it can intelligibly be applied." *Burlington*, ___ U.S. at ___, 112 S.Ct. at 2642. The Court instead adopted the approach reflected in Justice White's plurality opinion in *Delaware Valley II* and held that enhancement for contingency was not permitted under the fee-shifting provisions of the Solid Waste Disposal Act and the Clean Water Act. *Burlington*, ___ U.S. at ___, 112 S.Ct. at 2643-44.

Thus, Burlington eviscerates our holding in *Islamic Center* in which we stated that Justice O'Connor's position was "the only view to which a majority of the [Supreme] Court, and perhaps even the whole [Supreme] Court could subscribe." *Islamic Center*, 876 F.2d at 471. *Burlington* now tells us, however, how wrong we were. Accepting the error of previous thinking, and following the clearly lighted path of *Burlington*, we now hold that the contingent nature of the case cannot serve as a basis for enhancement of attorneys' fees awarded to prevailing plaintiffs under traditional fee-shifting provisions. Accordingly, it was error for the district court to enhance the lodestar amount by 33% based on this factor.

E

In summary, we conclude that the district court correctly calculated the lodestar amount to be $144,112.70. We also conclude that one of the enhancement factors applied by the district court—the results obtained—may have been

warranted; we therefore remand this issue to the district court for a determination of whether this factor is supported by custom in the legal community and, if so, the appropriate amount.

VI.

[25, 26] We now turn to the issue of sanctions which were accessed against Trinity's trial counsel, Robert Rader, Jr., pursuant to Rule 37(b), the appeal of which has been consolidated with this action. The imposition of sanctions is a matter of discretion for the district court; we review only for abuse. *Frame v. S-H, Inc.*, 967 F.2d 194, 202 (5th Cir.1992). We hold that the district court did not abuse its discretion in sanctioning Rader.

In its order of March 5, 1984, the district court noted that Trinity had been recalcitrant in relation to the discovery sought by Shipes. As early as November 24, 1981, the district court observed that Trinity's entire posture was infected with a tone of indifference and disrespect for clearly established rules of procedure. The district court warned that such lassitude would not be countenanced. On February 12, 1982, the district court stated that the recurring nature of Trinity's indifference to time limits substantially limited the credibility of Trinity's protestations of good faith. The district court further stated that Trinity's objection to and failure to answer two interrogatories directly violated an earlier court order; the district court cautioned that Trinity's failure to answer was tantamount to contempt of court. In 1982, the district court also noted that Trinity continued to adhere to its posture of disobedience to court orders and again warned that this attitude would not be countenanced further. At this point, the district court cautioned Rader that Rule 37(b) prescribed harsh actions against parties who failed to comply with orders concerning discovery.

Notwithstanding these warnings, still Shipes had to file numerous other motions to compel, which the district court granted. The district court held a hearing on March 16, 1984, to allow Rader to appear to show cause why he should

not be sanctioned. After the hearing, the district court concluded that there had been a deliberate effort by Rader to delay discovery. The district court did not, however, impose any sanctions at that time, but stated that it did not expect to be presented with any additional problems concerning discovery. After the hearing, Shipes was given the information to which Rader had referred. Then, however, on March 20, 1984, Shipes filed yet another motion for sanctions. At this time, the district court awarded sanctions. The court found that the information given to Shipes by Rader after the earlier hearing did not represent most of the outstanding discovery and that Rader had been disingenuous in his representations to the court that he had complied with the court's orders.

[27, 28] The district court did not abuse its discretion in sanctioning Rader. On the contrary, the district court gave Rader several warnings and on numerous occasions cautioned Rader to comply with discovery requests. The court did not err in concluding that Rader had failed to heed its warnings and had failed to comply in good faith. Neither did the court err as to the amount of $3,000.00. Under Rule 37(b), Rader may be personally liable for reasonable expenses, including attorneys' fees, caused by his failure to comply with a discovery order. *Batson v. Neal Spelce Assoc. Inc.*, 765 F.2d 511, 516 (5th Cir.1985). The affidavit presented by Shipes's attorney along with the January 23, 1984 motion for sanctions showed attorneys' fees and expenses in the amount of $1,617.50. On March 16, 1984, Shipes's attorneys had to attend a hearing for Rader to show why he should not be sanctioned, and on March 20, 1984, Shipes's attorneys had to prepare yet another motion for sanctions. It was reasonable for the district court to assume that the expenses and fees involved in the second motion were similar to those incurred in preparing the first motion. We therefore affirm the district court in sanctioning Rader in the amount of $3,000.00.

VII.

For the reasons stated above, we affirm the district court's certification of a class. Furthermore, we affirm the

district court on the issue of damages. We reverse, vacate, and remand, however, on the issue of attorneys' fees; the district court correctly determined the lodestar amount, but enhancement should not have been ordered except possibly on one *Johnson* factor—the results obtained—with respect to which we remand. In addition, we affirm the district court's sanctioning of Trinity's trial counsel. Accordingly, the decision of the district court is

AFFIRMED in part; REVERSED, VACATED, and REMANDED in part.

IN THE

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF TEXAS

TYLER DIVISION

NO. TY-80-462-CA

FOREST HENRY SHIPES, et al.,

v.

TRINITY INDUSTRIES, INC.

ORDER

The above-styled civil action is brought as a class action, pursuant to Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e, *et seq.*, to challenge the allegedly discriminatory employment practices and policies of Trinity Industries, with respect to two of defendant company's plants, hereinafter designated as Longview East and Longview West. The action was originally filed by plaintiff Forest Henry Shipes on December 16, 1980. Plaintiffs have since moved for leave to file an amended complaint, to include Willie McCoy as a named plaintiff. However, plaintiff now states that, since McCoy is a member of the putative class and will be represented in this action by Shipes if the action is certified as a class action, he need not be accorded representative status at this time.

In his complaint, Shipes alleges that defendant company maintains employment practices which discriminate against black employees on the basis of race. Specifically, plaintiff alleges that defendant has discriminated against black employees at its Longview East and Longview West plants with respect to its practices and policies affecting job

assignment, job classification, promotion, pay, layoff, transfer, and discharge. Shipes individually alleges he has been denied equal employment opportunities, by virtue of defendant's job classification, promotion, pay, and layoff practices. He seeks reinstatement and recovery of lost wages for himself. On behalf of the class of black employees, Shipes seeks backpay and other equitable relief.

I.

Plaintiff Shipes was employed at defendant's Longview East plant, as a welder's helper, from September 23, 1979, to June 30, 1980, at which time he was laid off. Shipes filed a complaint with the Equal Opportunity Employment Commission on July 10, 1980, alleging he had been victimized in several respects by the discriminatory employment policies and practices of defendant. The allegations of the complaint were limited to charges of discrimination in employment against plaintiff; the EEOC charge did not contain any class charges or specific assertions that defendant Trinity Industries maintained employment practices which discriminated against black employees as a class.

Prior to the completion of its investigation and before it had the opportunity to make factual findings with respect to Shipes' charge, the EEOC issued to Shipes a "right to sue" letter, whereupon he filed the instant action, as a class action. Defendant now contends that the present action must be dismissed, at least insofar as it includes allegations of class discrimination, because such claims were not presented in the original EEOC charge. Accordingly, defendant contends, the class claims must be dismissed for failure to satisfy the jurisdictional prerequisites of Title VII.

Defendant's contention in this relation relies on the doctrine that allegations contained in a judicial complaint filed under Title VII must be within the "scope of the complaint" filed with the EEOC. *Sanchez v. Standard Brands, Inc.*, 431 F.2d 455, 466-67 (5th Cir. 1970). The Court of Appeals for the Fifth Circuit has been firm in its insistence that Title VII plaintiffs satisfy the jurisdictional prerequisites of that statute. However, that court has taken a flexible view as to the manner in which those requirements are to be satisfied.

See, e.g., Reeb v. Economic Opportunity Atlanta, 516 F.2d 924 (5th Cir. 1975) (period of limitations); *Gamble v. Birmingham Southern Railroad Co.,* 514 F.2d 678 (5th Cir. 1975) (substantive scope of the complaint). As the court noted in *Sanchez, supra:*

> The basic purposes of Title VII are clearly discernible. Mindful of the remedial and humanitarian underpinnings of Title VII and of the crucial role played by the private litigants in the statutory scheme, courts construing Title VII have been extremely reluctant to allow procedural technicalities to bar claims brought under the Act.

431 F.2d at 460. With specific reference to the adequacy of the EEOC charge as a necessary predicate to subsequent federal civil actions, the court noted:

> We must ever be mindful that the provisions of Title VII were not designed for the sophisticated or the cognoscenti, but to protect equality of opportunity among all employees and prospective employees.

Id. at 463.

The Court of Appeals for the Fifth Circuit has never held that a plaintiff's EEOC charge must contain class allegations before that plaintiff may file a subsequent civil action as a class action. Nor would such a doctrine comport with the Circuit's holdings on related topics, or the "remedial and humanitarian underpinnings of Title VII." In advancing this contention, defendant relies exclusively on a recent district court decision. In *Fellows v. Universal Restaurants, Inc.,* 26 E.P.D. ¶31,973 (N.D. Tex. 1981), the court held:

> There must be some indication of class related unlawful employment practices in the administrative record prior to the institution of a class suit in federal court.

26 E.P.D. at 21,385. In support of this novel conclusion, the court cited *Sanchez v. Standard Brands, Inc., supra, Gamble v. Birmingham Southern Railroad Co., supra,* and *Falcon v. General Telephone Co.,* 626 F.2d 369, *vacated* 450 U.S. 1036 (1981), *reinstated in part without opinion,*

reversed 50 LW 4638 (1982). These decisions do not support the conclusion reached in *Fellows*. Neither the terms, the logic, nor the implications of *Sanchez* and its progeny justify the limitations on judicial relief under Title VII imposed by the court in *Fellows*.

Indeed, the district court decision is contrary to the established law of the Fifth Circuit concerning the sufficiency of an individual EEOC complaint as a jurisdictional predicate for a subsequent Title VII class action. The Court of Appeals for the Fifth Circuit has held, without equivocation, that a class action can be maintained under Title VII, even though only one member of the incipient class has filed a charge of discrimination with the EEOC. *Miller v. International Paper Co.*, 408 F.2d 283 (5th Cir. 1969); *Oatis v. Crown Zellerbach Corp.*, 398 F.2d 495 (5th Cir. 1968); *see Sanchez v. Standard Brands, Inc.*, 431 F.2d at 460. In *Sanchez*, the court noted that the doctrine in this relation is consistent with the more general principle of latitude in interpreting the procedural requirements for Title VII litigation. More specifically, the court in *Oatis* noted:

> A [Title VII] suit is . . . private in form only. When a plaintiff brings an action under that Title, he cannot recover damages. If he obtains an injunction, he does so not for himself alone, but also as a "private attorney general," vindicating a policy that Congress considered of the highest priority.

398 F.2d at 499, quoting *Newman v. Piggie Part Enterprises*, 390 U.S. 400 (1968); *accord Miller v. International Paper Co., supra*, 408 F.2d at 284-85. On the basis of this analysis, the court in *Oatis* evaluated the defendant's contention that an individual employee, after filing an EEOC charge, could not represent, as a class plaintiff, other employees similarly situated who had not filed such charges. The court rejected that limited view, and concluded:

> The better approach would appear to be that once an aggrieved person raises a particular issue with the EEOC which he has standing to raise, he may bring an action for himself and the class of persons similarly situated.

398 F.2d at 498.

The EEOC charge filed by Shipes contained allegations that the defendant had discriminated against him on the ground of race. The charge did not advance a claim of a single discrete act of discrimination. Rather, Shipes claimed had been victimized by biased treatment at several different stages of his tenure with defendant, including job assignment and pay, in addition to the decision to lay him off in June, 1980. As the court in *Oatis* noted, "racial discrimination is by definition class discrimination." 398 F.2d at 499; *see also General Telephone Co. of the Southwest v. Falcon,* _____ U.S. _____, 50 LW 4638, 4640 (1982) ("We cannot disagree with the proposition . . . that racial discrimination is by definition class discrimination."). This is not to say, of course, that all Title VII actions are, by their nature, class actions. (Indeed, in *General Telephone Co. v. Falcon, supra* (discussed below), the Court explicitly rejected this view.) A class action may only be maintained if the plaintiff is able to satisfy the specific requirements of Rule 23. However, the holdings in *Sanchez, Miller,* and *Oatis* clearly provide that, as a jurisdictional matter, the presence of allegations of racial discrimination in an EEOC charge are sufficient to serve as a predicate for a subsequent class action under Title VII. "To require separate, identical charges before the EEOC, filed against the same employer . . . would tend to frustrate our system of justice and order." *Oatis v. Crown Zellerbach, supra,* 398 F.2d at 499.

II.

Upon a motion for class certification, Rule 23, F.R.CIV.P., requires that a determination be made as to whether the suit is properly maintainable as a class action. For this purpose, a hearing was held on April 28, 1982. On the basis of evidence and argument adduced at that hearing, it has been determined that the instant action may be maintained as a class action within the standards set forth in the Federal Rules of Civil Procedure.

As already noted, this action involves a broad-gauged attack on the employment practices of Trinity Industries, with respect to their two Longview plants. Plaintiff charges that, from the point of initial employment, the policies and practices of defendant with respect to its employees are infected with racial discrimination. Specifically, Shipes contends that black employees at defendant's Longview East and Longview West plant are treated unequally in all respects of their association with Trinity Industries. Among the aspects of differential treatment alleged by plaintiff are, as previously detailed, initial job assignment, subsequent job transfer and promotion decisions, wage scales, layoff decisions, and dismissal determinations.

With the exception of initial employment decisions, which are not questioned in the present action, plaintiff's complaint challenges the full range of employment practices and policies of defendant. Broad actions of this nature, based on contentions of wide-spread employment discrimination, have been labeled "across the board" actions, and have received, on numerous occasions, the imprimatur of the Court of Appeals for the Fifth Circuit. The cornerstone of this doctrine is that court's decision in *Johnson v. Georgia Highway Express,* 417 F.2d 1122 (5th Cir. 1969), which upheld the right of a discharged black employee to litigate a broadly-inclusive action against the employment practices of his former employee, in the form of a class action under Title VII. The plaintiff in *Johnson* was permitted to represent all persons affected by the employer's allegedly discriminatory employment practices, even though the individually named class representative might have been affected by those practices as to only one facet, such as racially motivated discharge, and had not individually experienced other forms of employment discrimination, as, for example, a discriminatory denial of promotion.

The Court of Appeals for the Fifth Circuit has reaffirmed the *Johnson* holding numerous times, most recently in *Phillips v. Joint Legislative Committee,* 637 F.2d 1014, 1024 (5th Cir. 1981). *See also Satterwhite v. City of Greenville,* 578 F.2d 987 (5th Cir. 1978) (*en banc*), *vacated on other grounds,* 445 U.S. 940 (1979). *Phillips* and *Satterwhite*

establish conclusively that the *Johnson* doctrine survived the Supreme Court's decision in *East Texas Motor Freight System, Inc. v. Rodriguez,* 431 U.S. 395 (1977). In *Rodriguez,* the Supreme Court reversed a decision of the Court of Appeals for the Fifth Circuit certifying a class, on the grounds that the class representative in that case was not a member of the class he sought to represent, and did not possess the same interest and injury as the class. A variety of factors contributed to this holding, and a review of them indicates that *Rodriguez* in no way undermines the legitimacy of "across the board" actions. First, the plaintiffs in Rodriguez did not move for class certification at trial. Second, the evidence and argument adduced at trial was limited to the individual claims of the named plaintiffs. Third, stipulations offered at trial greatly narrowed the range of issues properly presented for adjudication. Fourth, the Court of Appeals had certified the class, after trial, on the basis of a trial record that, in the judgment of the Supreme Court, plainly demonstrated the incapacity of the named plaintiffs adequately to represent the class, as required by Rule 23(a)(4). In view of all these critical limitations on the factual and legal circumstances involved in *Rodriguez,* the adjudication of class claims by the Court of Appeals did not comport with the established procedures for class certification contemplated by the Federal Rules of Civil Procedure.

The factors enumerated here stand as limitations on the applicability of *Rodriguez* to the instant action. Indeed, as previously noted, the Fifth Circuit has made it plain that the Court's holding in *Rodriguez* in no manner compromises the viability of the *Johnson* doctrine. The Court of Appeals has acknowledged the *Rodriguez* holding to the effect that a class representative "must be part of the class and possess the same interest and injury as the class." 431 U.S. at 403, quoting *Schlesinger v. Reservists Committee to Stop the War,* 418 U.S. 208, 216 (1974). This doctrine is plainly founded on the Constitutional requirements of Article III, generally considered under the rubric of "standing." The "case or controversy" principles of Article III are, of course, applicable to all judicial actions, whether or not they present class allegations. Beyond the threshold

constitutional considerations, the typicality and commonality requirements of Rule 23 serve to satisfy the concern that the individual claims of the class representative be fundamentally related to the claims advanced on behalf of the class as a whole. The Rule 23 standards will be addressed separately, below. With respect to the constitutional criterion, the constraint on class actions set forth in *Rodriguez* has been held to require that a class plaintiff suffer from the alleged discrimination "in some respect" and not that the individual experience precisely the same form of discrimination as other class members. *Satterwhite v. City of Greenville, supra,* 578 F.2d at 993-994 n. 8. In *Payne v. Travenol Laboratories,* 565 F.2d 895 (5th Cir. 1978), *cert. denied* 439 U.S. 835 (1978), the Court of Appeals for the Fifth Circuit held that the named plaintiffs could challenge the discriminatory practices of defendant, although they personally were not subject to any particular aspects of discrimination. "As parties who have allegedly been aggrieved by some of these discriminatory practices, plaintiffs have demonstrated a sufficient nexus to enable them to represent other class members suffering from different practices motivated by the same policies." 565 F.2d at 900.

In its term just completed, the Supreme Court reviewed the maintainability of across the board actions as class actions. In *General Telephone Co. of the Southwest v. Falcon,* _____ U.S. _____, 50 LW 4638 (1982), the Court reversed a lower court order, upheld by the Court of Appeals for the Fifth Circuit, certifying an across the board class action brought by an individual employee on behalf of all employees of defendant company. However, as in *Rodriguez,* the Court's opinion is closely tied to the specific facts of the case, and in no wise constitues a broad disapproval of the *Johnson* doctrine. In *Falcon,* the district court certified a plaintiff class, without holding an evidentiary hearing to determine the adequacy of class representation under the standards of Rule 23. Such a cavalier approach is clearly contrary to the spirit of the Federal Rules, and, indeed, was explicitly disapproved in Judge Godbold's concurring opinion in *Johnson v. Georgia Highway Express,*

417 F.2d at 1125-1127. The Court emphasized again, as it had in *Rodriguez,* that "careful attention to the requirements of Rule 23 remains . . . indispensable." 50 LW at 4640. The district court's wholesale disregard of those criteria was fatal. In a crucial passage, the Court noted:

> The District Court's error in this case . . . is the failure to evaluate carefully the legitimacy of the named plaintiff's plea that he is a proper class representative under Rule 23 (a) . . . Sometimes the issues are plain enough from the pleadings to determine whether the interests of the absent parties are fairly encompassed within the named plaintiff's claim, and sometimes it may be necessary for the court to probe behind the pleadings before coming to rest on the certification question.

Moreover, as was the case in *Rodriguez,* the manner in which the plaintiff in *Falcon* chose to proceed at trial indicated the inadequacy of class representation and the impropriety of class certification. The plaintiff's "evidentiary approaches to the individual class claims were entirely different." *Id.* This fundamental disparity was reflected in the district court's "bifurcated findings on liability" which, in the view of the Supreme Court, demonstrated that "the individual and class claims might as well have been tried separately." *Id.* Accordingly, based on the conduct of the trial, the Court concluded that, in *Falcon,* "the maintenance of [plaintiff's] action as a class action did not advance 'the efficiency and economy of litigation which is a principal purpose of the procedure.' " *Id.,* quoting *American Pipe & Construction Co. v. Utah,* 414 U.S. 538, 553 (1974).

In resolving the issue of class certification, a court cannot, of course, always prophesy the nature of proof a plaintiff, may present, on behalf of himself or the class, at trial. However, the Supreme Court emphasized the "tentative" nature of class certification orders, and the flexibility provided by the class action mechanism. "Even after a certification order is entered, the judge remains free to modify it in the light of subsequent developments in the litigation." 50 LW at 4641. The district court in *Falcon* erred, not in its reliance

on the *Johnson* doctrine, but rather in its inattention, at all stages of the litigation, to the particular demands which devolve on the judge presiding over class actions.

Thus, the Court's opinion in *Falcon* stands as a reaffirmation of the essentially fiduciary duty of a court to supervise, throughout the case, the manner in which class claims are litigated, to insure that the requirements of Rule 23 are met, and that the interests of the passive class members are adequately represented. *See Cotton v. Hinton*, 559 F.2d 1326 (5th Cir. 1975), *cert. denied*, 423 U.S. 864 (1975). Beyond this limited, though important, caution against lackadaisical application of the criteria of Rule 23, *Falcon* endorses "the proposition underlying the across-the-board rule — that racial discrimination is by definition class discrimination", 50 LW at 4641, and plainly implies that such actions are properly maintainable as class actions, provided the mandatory standards of Rule 23 are met.

The holding of the Court of Appeals for the Fifth Circuit that civil actions of this nature are maintainable as class actions relates to two connected but distinct concerns. Rule 23(a) embodies the requirements of typicality and commonality; these matters will be discussed below. Additionally, across the board class actions implicate a fundamental jurisdictional concern, rooted in the United States Constitution. Article III of the Constitution requires an actual case or controversy as a predicate to the exercise of federal judicial authority. At a minimum, this provision required

> the party who invokes the court's authority to "show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant" [citation omitted] and that the injury "fairly can be traced to the challenged action" and "is likely to be redressed by a favorable decision."

Valley Forge Christian College v. Americans United for Separation of Church and State, _____ U.S. _____, 50 LW 4103, 4105 (1982) (citations omitted). Translated into the area of class actions, this constitutional requirement mandates that a class representative establish a nexus between her individual claim and the claim of the putative

class. The *Johnson* doctrine, and its support in an unbroken line of decisions over the past thirteen years, stands for the principle that class action plaintiffs challenging a broad policy of racial discrimination in employment establish such a nexus, if they personally have been victimized by one facet of the policy.

At the hearing on class certification, plaintiff offered statistical evidence which establishes, as a preliminary matter, disparities in the employment of blacks at the two plants in question. Evaluation of this evidence and its probative value with respect to the issue of standing is not dispositive, in any manner, of the issue pertaining to the existence *vel non* of discrimination at defendants' two plants. Even a preliminary inquiry into the merits of the substantive contention of the plaintiff class is foreclosed at this stage of the litigation. *Eisen v. Carlisle & Jacquelin,* 417 U.S. 156, 177 (1974). However, for purposes of determining standing, the substantive allegations of the complaint are taken as true, and the plaintiff class is therefore entitled to any presumptions or inferences that might logically be drawn from the complaint or the statistical evidence adduced at the class certification hearing. *Warth v. Seldin,* 422 U.S. 490, 501 (1975). Individually, plaintiff Shipes has a colorable personal stake in this case, in that he claims he was treated unfairly by defendant, and that this inequitable treatment was based on race. Shipes has established standing for the purpose of bringing the present action.

Again, it must be emphasized that resolution of the question of standing is merely a threshold determination that a nexus exists between the claims of the named plaintiff and the claims of the class he purports to represent sufficient to meet the minimum constitutional standard for a "case or controversy." A determination that the named plaintiff has standing is in no manner dispositive of the issue of the propriety of maintaining the actions as a class action. To the extent the nexus required by the Constitution is satisfied by a finding of congruence between the claims of the named plaintiff and those of the class as a whole, this similarity will have bearing on the criteria of typicality and commonality set forth in Rule 23, F.R.CIV.P. However, as noted

above, the Supreme Court, in *Falcon,* stated the need "to evaluate carefully the legitimacy of the named plaintiff's pleas that he is a proper class representative under Rule 23(a)." 50 LW at 4641. Rule 23(a) sets forth four mandatory prerequisites for maintenance of class actions. That provision states:

> One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

Each of the four criteria must be examined separately, and each must be satisfied before an action will be certified as a class action. Though the four inquiries are separate, they involve substantially overlapping considerations, especially among the requirements of commonality, typicality, and adequacy of representation. Indeed, some courts have concluded that the issues of commonality and typicality are identical. *See, e.g., Rakes v. Coleman,* 318 F. Supp. 181, 190 (E.D. Va. 1970). Notwithstanding, this conclusion contravenes the well-established presumption that a statute should not be interpreted in a manner that renders any of its provisions redundant or meaningless.

At the class certification hearing, defendant strenuously urged two separate, though related, objections to certification of a plaintiff class in the present action. Though the factual and legal underpinnings of these arguments are closely connected, defendant's contentions ultimately must be distinguished and analyzed separately. First, defendant contends that plaintiff Shipes, who was employed only at the Longview East plant, may not represent employees of defendant's Longview West plant. In substance, this argument contends that the questions of law and fact raised by Shipes' complaint lack the requisite commonality with the questions raised by the claims of those class members who

are, or in the past have been, employed at the Longview West plant. The contention will be evaluated under the rubric of commonality, as set out below. Second, defendant states that Shipes personally has alleged discriminatory treatment in the form of classification, pay, and lay-off decisions. Defendant contends that, even assuming the validity of these allegations, they are fundamentally different from, *e.g.*, claims of discriminatory discharge or failure to promote. Essentially, this argument involves an assertion that Shipes claims are not typical of the claims of other class members. It will be evaluated in the course of analyzing the "typicality" issue, *infra*.

III.

1. Numerosity

The requirement of numerosity is not to be resolved on the basis of an arbitrary numerical calculation, but rather with reference to the particular circumstances of the action. *General Telephone Co. of the Northwest, Inc. v. EEOC*, 446 U.S. 318, 330 (1980). The core of the numerosity requirement involves an analysis of the practical realities which allegedly render joinder of all putative class members impracticable, as opposed to impossible. *See Garcia v. Gloor*, 618 F.2d 264 (5th Cir. 1980). As a general matter, smaller classes are more readily certified when the relief sought is, at least in part, injunctive. In such instance, the benefits would inure not only to the known class, but also to a future class of indefinite size (here, future employees at the two plants). *Jones v. Diamond*, 519 F.2d 1090, 1100 (5th Cir. 1975); *see* Rule 23(b)(2), and discussion of that Rule below. Properly considered, the plaintiff class should include these unknown future members. The joinder of such persons is unmistakenly and intrinsically impracticable. *Jack v. American Linen Service*, 498 F.2d 122, 124 (5th Cir. 1974). *See also Adams v. Jefferson Davis Parish School Board*, 76 F.R.D. 621, 622 (E.D. La. 1977).

Plaintiff has identified 311 persons who have been employed at the Longview East plant since that plant opened in 1979, based on an employee list produced by defendants pursuant to pre-trial discovery. Apparently, a

similar list of employees at the Longview West plant has not been disclosed. However, EEO-1 reports for the West plant show 23 black employees in 1978, 26 in 1979, 32 in 1980, and 39 in 1981. Additionally, the request of plaintiff for injunctive relief on behalf of the class creates a class of future employees, who must be included in the evaluation of numerosity. Plainly, plaintiff in this action has satisfied the requirement of numerosity.

2. Commonality

Rule 23(a)(2) requires that there be questions of law or fact common to the class. On its face, the rule does not mandate absolute commonality; nor does the rule require common questions of law *and* fact. The language of the rule is disjunctive. Factual differences among the claims of members of the class are not fatal, if common questions of law exist. *Like v. Carter,* 448 F.,2d 798 (8th Cir. 1971), *cert. denied* 405 U.S. 1045 (1972). Generally, the approach to commonality has been flexible. The requirement is considered satisfied, if the common questions raised by factual or legal elements in the action predominate over any differences or variations which exist. *E.g., Escalera v. New York City Housing Authority, 425 F.2d 853 (2nd Cir. 1970).*

In actions involving claims of racial discrimination, the demarcation between issues which involve factual determinations and those which require legal conclusions is not always clear. The Supreme Court recently disapproved the doctrine that, in such actions, the resolution of the issue of the existence *vel non* of discrimination was an "ultimate fact" and so was different, in a fundamental sense, from other findings of fact, which were "subsidiary" to that final issue. *Pullman-Standard v. Swint,* _____ U.S. _____, 50 LW 4425 (1982). In the aftermath of this decision, it is not presently clear precisely which conclusions are factual and which legal, in actions involving claims of racial discrimination. However, that nettlesome issue need not be resolved, in order to conduct the present inquiry into commonality, for, as noted, common issues of fact *or* law are sufficient to meet the standard of Rule 23 (a) (2).

In any event, allegations of class-wide discrimination in all different phases of employment present an intricate blend of legal and factual issues. Most fundamentally, the complaint in this action presents the issue of law whether Trinity Industries maintains an employment policy that violates the federal law proscribing discrimination in employment on the basis of race. As set forth previously, plaintiff alleges that the overall policy of discrimination is effected in a variety of ways, at different stages of employment. Though the cases of individual employees affected by different aspects of the overall policy may present variations in the factual elements of the claims, the basic legal standard under which the claims will be evaluated is common to all members of the class. Moreover, certain fundamental factual matters, involving the circumstances of employment at the plants, will have been experienced commonly by all members of the class. Finally, the considerations which justify the maintenance of across the board class actions also support the conclusion that this form of civil action presents common questions of law and fact. The central issue here is the alleged maintenance and pursuit, by Trinity Industries, of an employment policy which discriminates on the basis of race. If such a policy exists, the legal claims of the named plaintiff are, by definition, commonly held by all members of the plaintiff class.

As stated above, defendant contends that, if a class action is appropriate, the plaintiff class should be limited to employees of defendant's Longview East plant, where plaintiff Shipes was employed, and where he would have encountered any alleged discrimination in employment. Defendant argues that the factual and legal issues raised by a claim of racial discrimination in employment at the Longview East plant have nothing in common with a claim of that nature involving the employment policies and practices in force at the Longview West plant. In support of this argument, defendant avers that the two plants are operated autonomously, and that the employment policies at the plants are wholly discrete.

It appears that the individual plant managers at the two plants involved in this action have a substantial amount of

independence in making and enforcing employment policy. Beyond question, the central management of Trinity Industries has delegated to its local plant officials a large degree of responsibility in conducting the daily operations of the plants. Yet, this decentralization is not absolute, and as a factual matter the plants are related in crucial ways. The employment handbook of Trinity Industries governs employee relations at both plants. The handbook is in no sense comprehensive, but the limited guidance provided by its terms does connect the two Longview plants in a manner which suggests at least a limited form of commonality.

Defendant urges that the handbook provides only the most peripheral direction for plant managers in their dealings with employees. In view of the sparse particulars contained in the handbook, this assertion is plausible. However, it appears that, other than this handbook, defendant maintains no formulation of its policies and practices with respect to employment. The lack of objective standards for employment renders the process of selecting employees, delegating to them job assignments, and reviewing their employment record, an intensely subjective process. These subjective employment procedures "provide a ready mechanism for racial discrimination," especially when implemented by white supervisors. *Robbins v. White-Wilson Medical Clinic, Inc.*, 660 F.2d 1067 (5th Cir. 1981); *Johnson v. Uncle Ben's, Inc.*, 628 F.2d 419, 426 (5th Cir. 1980), *vacated on other grounds*, 451 U.S. 902 (1981). If the central management of defendant company has not promulgated a set of reasonably objective criteria for employment procedures, that failure, in itself, might, under the prevailing law of employment discrimination, present a legal and/or factual issue common to the two Longview plants.

Moreover, defendant maintains a common insurance plan and a unified pension and retirement system, applicable to employees at both plants. If, as plaintiffs contend, the compensation system of defendants is infected with racial animus, then these centralized systems, which are part of the overall remuneration scheme, will be implicated in the present action, and therefore present common questions. *See, Penk v. Oregon State Board of Higher Education*, 93F.R.D. 45 (D. Ore. 1981).

Defendant contends that the pay scales are wholly within the discretion of individual plant managers. However, it appears that on five separate occasions in the period between the opening of the Longview East plant in 1979 and December 1981, identical wage increases were granted employees at both Longview plants. Furthermore, in June 1980, when a large number of employees at the East plant were laid off, a significant number of those employees were directly transferred to the West plant, and they immediately began working at that facility. At the certification hearing, a defendant contended this fact emphasized the *lack* of commonality between the two plants. This argument is specious. In reality, the transfer of workers between the two plants stands as persuasive evidence of the coordination of employment practices at the Longview facilities, despite the protestations of autonomy and discretion. *Petty v. People's Gas Light & Coke Co.*, 86 F.R.D. 336, 340-41 (N.D. Ill. 1979); *see also Penk v. Oregon St. Board, supra*, 93 F.R.D. at 49-50; *Hairston v. McLean Trucking Co.*, 62 F.R.D. 642,663 (M.D. N.C. 1974) ("coordination of employment policies" sufficient to overcome facial decentralization of management decisions); *Williams v. New Orleans Steamship Association*, 341 F. Supp. 613 (E.D. La. 1972).

Finally, defendant contends that commonality does not exist between the two Longview plants, because the two facilities do not produce identical products, and the job classifications and descriptions applicable to the plants are not exactly the same. This contention is belied by a simple review of the job descriptions for the plant provided to plaintiffs through discovery. The verbal descriptions substantially overlap, and include a number of job classifications which are virtually identical. Were the job classifications and categories at the two plants "entirely different", and the decentralization of management "absolute," certification of a class including employees at both plants would be inappropriate. *See Duncan v. State of Tennessee*, 84 F.R.D. 21, 35 (M.D. Tenn. 1979); *Carpenter v. Herschede Hall Clock Division*, 77 F.R.D. 700 (N.D. Miss. 1977). However, as the court in *Duncan v. State of Tennessee*, stated:

> [P]roof at this point does not so clearly show that employment practices and personnel decisions within each division are *totally* autonomous so as to preclude class treatment.

84 F.R.D. at 35 (emphasis supplied). *See Arnett v. American National Red Cross,* 78 F.R.D. 73, 76 (D.D.C. 1978); *Leisner v. New York Telephone Co.,* 358 F. Supp. 359, 371 (S.D. N.Y. 1973); *Ste. Marie v. Eastern R.R. Assoc.,* 72 F.R.D. 443, 448 (S.D. N.Y. 1976); *see also Fujita v. Sumitomo Bank,* 70 F.R.D. 406, 410 (N.D. Cal. 1975); *Doe v. First City Bancorporation,* 81 F.R.D. 562 (S.D. Texas 1978).

This preliminary determination regarding commonality is founded on a substantial amount of evidence, and the reasonable inferences drawn from that evidence, which tends to establish a series of connections between the two Longview plants. But if, during the progression of this case, defendant is able to support its contentions concerning the autonomy of employment decisions in the two plants, the class may, at that time, be decertified, or limited in the manner dictated by the evidence. *See Duncan v. State of Tennessee, supra,* 84 F.R.D. at 35. For the present, plaintiffs have amply demonstrated a connection between the two Longview plants, for purposes of establishing the requisite degree of commonality.

3. Typicality

Rule 23 also requires that the claims of the named plaintiffs be typical of the claims of the class as a whole. Simply put, this provision requires that the claims of the named plaintiff be established by factual allegations concerning his own experience, and that they also be typical of the individualized claims of the other class members. Typicality does not mean identity, but rather a broader form of congruity. *See Herbert v. Monsanto,* 576 F.2d 77 (5th Cir. 1978), *vacated on other grounds,* 580 F.2d 178 (5th Cir. 1978); *Leisner v. New York Tel. Co., supra,* 358 F. Supp. 359 (S.D.N.Y. 1973). The claims of plaintiff Shipes are typical of the claims of the class as a whole. As already stated, Shipes alleges he was subjected to personal discriminatory treatment in a variety of forms, including discrimination in classification,

pay, and lay-off decisions. These allegations span a broad range of the employment practices of defendant.

Defendant challenges the typicality of Shipes' claims. It contends that any experience an employee might have with discriminatory treatment in employment is essentially unique. In other words, defendant appears to argue that an employee victimized by discrimination in job classification lacks typicality with an employee who might have been denied a promotion for a discriminatory reason. In essence, defendant claims that each employment decision is discrete and, therefore, atypical.

This argument is confuted by the entire line of cases beginning with, and descending from *Johnson*. Indeed, in lodging and developing this argument in its post-hearing brief, defendant avoids entirely the doctrine of across the board class actions challenging discrimination in employment. That doctrine, explicated above, is plainly fatal to defendant's contention regarding the typicality of Shipes' claim. Isolation of one portion of defendant's argument will highlight its implausibility.

Defendant argues with special vigor that termination and promotion decisions are unique and are not susceptible to class treatment, because they involve highly particularized factual matters based on the employment records of specific employees. ("[T]he evidence as to each termination is unique to the named plaintiff or class member." Defendant's post-hearing brief, p. 14; "[P]romotion procedures are 'unique to each employee' and class action relief is not appropriate for claims of discrimination in promotion." *Id.* at p. 15.) However, from the inception of the across the board doctrine, the Court of Appeals for the Fifth Circuit has permitted class plaintiffs challenging discriminatory employment practices to represent former employees who had been discharged, as well as employees who claimed to have been victimized by discriminatory promotion practices. Indeed, in *Johnson* itself, the court approved a class action on behalf of a "class harmed by the alleged discrimination in hiring, *firing, promotion* and maintenance of facilities." *Johnson, supra,* 417 F.2d at 1124 (emphasis

supplied). *See also Payne v. Travenol Laboratories, supra,* 565 F.2d at 899. The claims of plaintiff Shipes, involving as they do allegations of racial discrimination in certain facets of employment at defendant's Longview East plant, are typical of the claims of the class as a whole, which includes employees who allegedly have been subjected to discriminatory treatment in the full range of employment at both Longview plants.

4. Adequacy of Representation

Rule 23(a)(4) requires that the named plaintiff fairly and adequately represent the class. This standard involves two considerations: the adequacy of class counsel, and the adequacy of the named plaintiff's assertion of the rights of the class. *In Re General Motors Corporate Engine Interchange Litigation,* 594 F.2d 1106 (7th Cir. 1979). The court is familiar with the counsel representing the plaintiff class, and is amply satisfied that she will conscientiously and competently handle all phases of this action. The concern for adequacy, as it relates to the class plaintiffs, in part requires that the interests of the named plaintiffs substantially coincide with those of the class as a whole. In large part, this consideration overlaps with the commonality and typicality requirements. The fundamental interest of the entire class is equitable relief from an assertedly pervasive policy of racial discrimination in employment. Shipes has demonstrated, in the course of this action thus far, that his efforts in attempting to secure such relief will be vigilant. Beyond this preliminary point, it is necessary that the interests of the plaintiff in remedial relief not conflict, in some fatal manner, with the interests of the class as a whole or with other individual members of the class. All plaintiffs in this action have a common interest in the eradication of racially discriminatory employment practices and policies. Accordingly, no conflict at this level is apparent. Should conflicts emerge at a later point in this action — for example, in the award of equitable relief in the form of reinstatement — such conflicts might appropriately be resolved by the use of sub-classes or other modifications of the class structure warranted by the evidence. *See Oatis v. Crown Zellerbach, supra,* 398 F.2d 496 (5th Cir. 1968); *Johnson v.*

Uncle Ben's Inc., supra, 628 F. 2d 419 (5th Cir. 1980), *vacated on other grounds,* 451 U.S. 902 (1981).

In an attempt to demonstrate that plaintiff does not adequately represent the interests of a class of black employees at defendant's Longview plants, defendant has submitted a number of affidavits, sworn to by employees, stating they do not wish to be represented by Shipes in a class action against defendant company. Such statements are intrinsically suspect, in view of the circumstances of their submission. Their credibility is, at best, tenuous. Moreover, it is well-established that the mere fact that potential class members desire to be omitted from the class does not refute the legitimacy of the class. *Williams v. New Orleans Steamship Ass'n,* 673 F.2d 742, 755 (5th Cir. 1982); *compare Bailey v. Ryan Stevedoring Co.,* 558 F.2d 551 (5th Cir. 1976), *cert. denied,* 432 U.S. 1052 (1977). The bare fact that an employee of defendant company believes that his employer does not engage in racially discriminatory employment practices does not establish that belief as a fact. Nor does an affidavit stating that belief render the particular employee unable to participate in the advantages of any equitable relief which might be awarded as a result of a conclusive legal demonstration that defendant did, in fact, engage in proscribed racial discrimination. As a class plaintiff, Shipes has demonstrated he will vigilantly advocate his claims, and also the claims of the Class, against the defendant company. Hence, he has satisfied the requirement of Rule 23(a)(4).

5. Relief generally applicable to the class

Apart from the requirement that any potential class representative satisfy each of the four portions of Rule 23(a), the Federal Rules additionally require that the named plaintiff satisfy at least one of the three sub-sections of Rule 23(b). Plaintiffs in this action assert their claim meets the test of Rule 23(b)(2). This section provides that an action may be maintained as a class action, if the prerequisites of Rule 23(a) are satisfied, and in addition:

> the party opposing the class has acted or refused to act on grounds generally applicable to the class,

thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole.

In this action, plaintiff class charges that Trinity Industries has maintained a policy of racial discrimination against the employees at its two Longview plants. Though the specific content of the policy may vary from member to member within the class, the claims of the class are shared in common, and the alleged actions of Trinity Industries, here challenged, are generally applicable to the class as a whole. This alleged pattern of conduct, attended by the possibility of equitable relief from its effects, renders the action maintainable as a class action under Rule 23(b)(2). *See Bing v. Roadway Express, Inc.*, 485 F.2d 441, 447 (5th Cir. 1973); *Rowe v. General Motors Corporation*, 457 F.2d 348, 359 n. 24 (5th Cir. 1972). *See also* Advisory Notes to Rule 23, 39 F.R.D. at 102 ("Illustrative [of Rule 23(b)(2) actions] are various actions . . . where a party is charged with discriminating against a class, usually one whose members are incapable of specific enumeration.").

On the basis of the foregoing, this action may properly be maintained as a class action. The present suit is a proper means by which past, present, and future black employees of the two Longview plants operated by Trinity Industries should seek legal relief from their claims of racial discrimination in employment. Accordingly, it is

ORDERED that plaintiff's motion for class certification is GRANTED. It is further

ORDERED that the above-styled civil action shall proceed as a class action pursuant to Rule 23(b)(2), F.R.CIV.P. It is further

ORDERED that the plaintiff class consist of all past, present, and prospective black employees of the two Longview plants operated by Trinity Industries, who have been subjected to unlawful discrimination by their employer on account of race, since January 10, 1980, or will be subjected to such discrimination in the future. It is further

ORDERED that defendant's motion to dismiss the present action is, in all things, DENIED.

SIGNED and ENTERED this 29th day of July, 1982.

WILLIAM WAYNE JUSTICE
Chief Judge

IN THE

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF TEXAS

TYLER DIVISION

NO. TY-80-462-CA

FOREST HENRY SHIPES, et al.,

v.

TRINITY INDUSTRIES, INC.

ORDER

On December 18, 1990, a hearing has held on the preliminary damage model, proposed by the court appointed expert witness, Dr. Bernard Yancey, for use in determining the amount of compensation owed individual plaintiff class members, by reason of the discrimination which defendant was determined to be responsible for in the liability phase of these proceedings.

After careful review of the preliminary damage model, and the objections to it articulated by counsel at the hearing, it appears that a judicial determination regarding the general approach that should be use in developing the damage model will expedite development and implementation of the final model. Therefore, this order will establish the guidelines that Dr. Yancey is to follow in constructing the final model to be submitted to the court.

General Methodology

At the hearing on this matter, the defendant objected to the general approach taken by Dr. Yancey, which attempts to determine the effect of discrimination on every such individual class member and award every such class member

damages accordingly. Defendant argues that since it was determined to have discriminated against plaintiffs as a class, the damages should be determined for the class as a whole, and then each class member should be awarded a pro rata share of the entire damage amount.

This objection miscomprehends the purpose of the remedy phase of class action litigation. The Court of Appeals for the Fifth Circuit has described phase II, or the remedies phase, of a class action as follows:

> At the start of a phase II trail[1] the employer faces a prior adjudication of class discrimination. The procedures thereafter assume that fact and are calculated to identify individual claimant's relationship to the condemned practices without a second trial of the issue of class discrimination.

Richardson v. Byrd, 709 F.2d 1016, 1021 (5th Cir. 1983).

Both Dr. Yancey and the defendant's expert witness agree that the damage calculation method proposed by Dr. Yancey, which awards an individual plaintiff damages based on the mean wages paid to a white employee with the plaintiff's qualifications, is the most accurate method of determining the expected wage rate of an individual with a plaintiff's particularized qualifications. It is impossible to determine the precise monetary effect defendant's discrimination had on particular plaintiffs; however, basing individual recovery on the difference between a plaintiff's expected and actual wages seems to be the best method of approximately the effect of discrimination.

The defendant argues, correctly, that this method will overcompensate some plaintiff class members and undercompensate others. In the absence of discrimination, some black employees would be paid below, and others above, the mean wage for an employee with their respective qualifications. The same would be true of white employees. However,

---

[1]Although the Fifth Circuit is describing a phase II which is accomplished through a second trial, its discussion is equally applicable to the situation at bar, where the court will make a determination of remedies absent a full scale trial.

defendant has not proposed, and the court is unaware of, any feasible way of determining which plaintiff class members would actually have been paid above and below the mean. The ability to make this determination not being available, awarding plaintiff class members damages based on the mean wage paid to white employees with similar qualifications is the most equitable method attainable. As the Fifth Circuit has admonished:

> Difficulty in calculating the precise amount of back pay does not defeat the right itself. *Pettway v. American Cast Iron Pipe Co.*, 494 F.2d 211, 260 (5th Cir. 1974), *cert. denied* 439 U.S. 1115, 99 S.Ct. 1020, 59 L.Ed. 2d 74 (1979). Indeed "in computing a back pay award two principles are lucid: (1) unrealistic exactitude is not required, and (2) uncertainties in determining what an employee would have earned before discrimination, should be resolved against the discriminating employer." *Id.* at 260-61 (footnotes omitted).

Salines v. Roadway Exp. Inc., 735 F.2d 1574 (5th Cir. 1984).

Discrimination in Initial Hiring Rates — Both Plants

Back pay for discrimination in initial hiring will be awarded to particular class members, based on the difference between the average starting wage paid to a white employee with the class member's qualifications and the actual starting wage paid to such class member. However, the method of calculating damages for discrimination in initial wage paid to certain employees re-hired after a lay-off or termination of employment, will be based on a formula using a) the higher of the employee's expected or actual wage when previously terminated or laid off, b) the number of months between termination and re-hire, and c) the increase in wages that has occurred over that time. This method will be used, because Dr. Yancey has stated that this formula correctly predicts 90% of the re-hire wages actually paid to the white employees, thereby making it a more accurate predictor of what plaintiff class members

should have been paid at re-hire than the formula developed by Dr. Yancey to determine damages in initial starting wages.[2]

Promotions — East Plant only

The formula used for promotions will use the same methodology as that used to determine the wage rate at the initial hire. The damages to which a specific plaintiff class member is entitled will be the difference between the average increase in wages experienced by white employees and the actual wage increases paid to each class member with similar qualifications.

Layoffs-West Plant

During the liability phase of the trial, it was determined that the defendant discriminated against the plaintiff class by laying off a disproportionate number of black employees. Ideally, damages for this type of discrimination would be awarded to the black employees who would not have been laid off, or been laid off at a later date, had there been no discrimination by the defendant. However, neither party has proposed a method of determining which of the black employees laid off by the defendant would have retained their positions in the absence of discrimination. Therefore, the most equitable method of awarding damages for this type of discrimination is to determine the total number of days that the group of black employees laid off would have worked except for discrimination, and then award each class member who was laid off damages based on a pro rata share of those days.

Given the above, damages for class members who were laid off by defendant should be determined as follows: 1) determine the median days worked by the group of white employees who were laid off or continuously worked a given

---

[2]The formula developed by Dr. Yancey to predict the wages at initial hire accurately predicts about 40% of the white employees' initial wages. Dr. Yancey testified, and the defendants do not contest, that this is a standard level of accuracy for this type of calculation.

calendar quarter;[3] 2) determine the median days worked by the group of similarly situated black employees; 3) use these two medians to determine a median number of days for the entire workforce;[4] 4) determine the total number of days that must be added to the days worked by the black employees to make the black employees' days-worked-median equal to the workforce median[5]; and 5) award all plaintiff class members who were laid off damages based on their individual pro rata shares of these days multiplied by their respective wage rates at the time they were severally laid off.

Lay-offs and terminations — East Plant

The defendant was held to have discriminated against the plaintiff class in both lay-offs and terminations for cause at the East Plant. The same considerations governing the award of damages for lay-offs at the West Plant are present in this damage award calculation; therefore, the same formula as that outlined above should be used, except that a) the median days worked will be determined using the

---

[3]Damages will be determined on a quarterly basis.

[4]Since the total number of persons laid off by the defendant in a given quarter would remain the same with or without the discrimination at issue here, it would be unfair to add enough days to the black employees' days worked, in order to increase the black employees' median to that of the white employees. This fact is best illustrated by the following example: assume there are an equal number of black and white employees in defendant's workforce and that 75 black employees and 25 white employees were laid off. If it be assumed, as must be done absent evidence to the contrary, that an equal number of black and white employees would have been laid off excluding discrimination, then 50 black and 50 white employees should have been laid off. Therefore, the black employees should be awarded damages for having 25 black employees laid off who should not have been laid off. Basing the damage award on the number of white employees laid off would result in the black class being compensated as though 50 black employees were laid off who should not have been.

[5]Both employees who continued to work and who were laid off must be used in the calculation of median days worked. Otherwise, plaintiffs would only be compensated to extent that they were laid off sooner than white employees who were laid off in the same calendar quarter; they would not be compensated for the damage caused by being laid off when they should have been retained as employees for the entire quarter.

days worked by terminated for cause, as well as laid off and continuously working, employees, and b) both terminated for cause and laid off plaintiff class members will share in the damage award.

Outstanding Data Problems

The defendant has been unable to supply Dr. Yancey with the qualifications of a number of the plaintiff class members, because it has been unable to locate the personnel applications for these individuals. Without these records, the best method for determining these individuals' qualifications is to ask the individuals themselves to recall their qualifications at the time that they applied for employment at Trinity. Therefore, defendant and plaintiff's counsel should make every effort to find these individuals and forward their qualifications to Dr. Yancey as soon as possible. Dr. Yancey will also submit to this court for consideration a method for approximating the damages of these individuals, for use in the event these plaintiff's cannot be located. Plaintiff has objected to using such an approximation to determine the class members final damages, and will submit to the court a draft of an order which would allow recalculation of any damages which are initially approximated, if and when the class members' actual qualifications become available.

Further, in order to fully compensate East Plant class members for discrimination in promotions, it was determined that salaried white employees who began as hourly plant employees be added to the database. See Order dated October 1, 1990. Specifically, defendants must supply Dr. Yancey with the personnel records for all hourly plant employees, hired during the same period as the plaintiff class members, who became salaried employees.

Finally, Dr. Yancey has requested that the cut-off date for class membership be clarified. The class includes all black employees who were employed by the defendant between January 10, 1980, and March 31, 1984. Employees who ended employment with the defendant on January 10, 1990, or who began employment on March 31, 1984, would be

included in the class, but not employees whose last day of work was January 9, 1980, or whose first day of work was April 1, 1984.

Timetable for Finalizing the Damage Calculations

All missing data should be supplied to Dr. Yancey on or before January 15, 1991. Dr. Yancey will then submit final copies of the damage calculations formula to both parties, and to the court, on or before February 1, 1990. Both parties will have two weeks after receipt of the final damage model in which to submit final objections to the model. After review of the parties' objections, a final hearing on the matter will be set, if appropriate; otherwise, a final ruling on the calculation of damages will be issued.

Based on the above, it is

ORDERED that on or before January 15, 1991, the defendant provide Dr. Yancey with personnel histories on all employees hired at the East Plant between January 10, 1980, and April 1, 1984, who at any time after being hired became salaried employees. Further, it is

ORDERED that both parties make every effort to determine the actual qualifications of the plaintiff class members whose personnel files are missing, and that both parties notify this court on or before February 1, 1991, whether they have been successful in determining such information. Further, it is

ORDERED that Dr. Bernard Yancey shall develop a final model for the calculation of damages in the above numbered action, in accordance with the guidelines stated in this order, and shall submit such model to the court, and to both parties, on or before February 1, 1991. Finally, it is

ORDERED that both parties submit final objections to the damage model proposed by Dr. Yancey within two weeks of receipt of the model from Dr. Yancey.

SIGNED this 27th day of December 1990.

WILLIAM WAYNE JUSTICE

William Wayne Justice
United States District Judge

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 91-4961

FOREST HENRY SHIPES, et al.,
Plaintiffs-Appellees,

versus

TRINITY INDUSTRIES,
Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of Texas

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion April 5, 1993, 5 Cir., _____, _____ F.2d _____)
(June 22, 1993)

Before WISDOM, JOLLY and DEMOSS, JR., Circuit Judges

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

E. GRADY JOLLY

United States Circuit Judge

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT
OFFICE OF THE CLERK

July 2, 1993

Mr. David Maland, Clerk
U.S. District Court
211 W. Ferguson, Room 106
Tyler, TX 75702

No. 91-4961 — SHIPES *-vs-* TRINITY INDUSTRIES
(D.C. No. TY 80-462-CA)

(X) Enclosed to you only is a certified copy of the judgment of this Court in the above cash issued as and for the mandate.

( ) The Court having denied the motion for stay of mandate, enclosed to you only is a certified copy of the judgment of this Court in the above case issued as and for the mandate.

( ) Having received from the Clerk of the Supreme Court a copy of the order of that Court denying certiorari, I enclose a certified copy of the judgment of this Court in the above case, issued as and for the mandate.

Enclosed herewith are the following additional documents:

(X) Copy of the Court's opinion.

( ) Original record on appeal or review. ( ) Volumes
(TO BE RETURNED SHORTLY)

( ) Other original papers forwarded with record.
( ) Envelope ( ) Box

(X) Bill of Costs approved by this Court.
(X) Copy enclosed to counsel.

Sincerely,
RICHARD E. WINDHORST, JR., Clerk
By: Melissa LeBlanc
Deputy Clerk

cc: (Letter Only)
Judge William Wayne Justice
Mr. George A. Harper
Ms. Nell Hahn

MDT-1
Rev. 5/92